Supreme Court of the United States

OCTOBER TERM, 1969

No. 269

EARL PRICE, *Petitioner*,

vs.

GEORGIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

INDEX

	Page
Notice of intention to apply to the Supreme Court of the United States filed in the Court of Appeals of the State of Georgia	1
Record from the Superior Court of Effingham County Georgia	4
Notice of appeal	4
Plea of autrefois acquit	5
Attachment—Indictment of October Term, 1962 with verdict of the jury, dated October 17, 1962 and defendant's plea of not guilty	8
Order overruling plea of autrefois acquit	11
Plea of not guilty, October 19, 1967	11
Verdict of October 20, 1967	11
Sentence	12

Page

Record from the Superior Court of Effingham County Georgia—Continued

Transcript of testimony, October 19, 1967 (excerpts) — 13

Motion by defendant — 13

Testimony of Mr. A. Parker Ford — 16

Defendant's Exhibit 1—Indictment of October Term, 1962 with verdict of jury, dated October 17, 1962 and defendant's plea of not guilty — 28

Charge of the court (excerpt) — 31

Enumeration of Errors filed in the Supreme Court of Georgia — 32

Proceedings in the Court of Appeals of the State of Georgia — 35

Opinion, Jordan, J., June 25, 1968 — 35

Opinion on motion for rehearing, July 24, 1968 — 37

Judgment — 39

Motion for rehearing — 40

Order denying motion for rehearing — 50

Notice of intention to apply for writ of certiorari to the Supreme Court of Georgia — 51

Order of Supreme Court of Georgia denying certiorari — 53

Order staying remittitur — 54

Clerk's certificate (omitted in printing) — 54

Application for certiorari to the Supreme Court of Georgia — 55

Certificate of counsel — 60

Judgment of Supreme Court of Georgia — 61

Clerk's certificate (omitted in printing) — 61

Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari — 62

IN THE COURT OF APPEALS OF THE STATE OF GEORGIA

Case Number 43,747

EARL PRICE, PLAINTIFF IN CERTIORARI

vs.

STATE OF GEORGIA, DEFENDANT IN CERTIORARI

NOTICE OF INTENTION TO APPLY TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI—
Filed September 30, 1968

TO THE CLERK OF THE COURT OF APPEALS OF GEORGIA.

You are hereby notified that it is the intention of EARL PRICE, Plaintiff in Certiorari to apply to The Supreme Court of the United States for a Writ of Certiorari to review the Judgment and action of The Court of Appeals in refusing to set aside the Judgment of the Trial Court, rendered and filed in the above stated case on June 25th, 1968, in which case a motion for rehearing was denied on July 24th, 1968, a Writ of Certiorari being filed in The Supreme Court of Georgia on August 22nd, 1968, the same being denied on September 24th, 1968, case no. 24,879. The following portions of the record are hereby ordered:—

1- Notice of Appeal filed in Effingham County, Georgia, Superior Court. (Page 1 of the record as prepared by Clerk of Trial Court.)

2- Special Plea of Autrefois Acquit. (Pages 2 thru 6 of record as prepared by Clerk of Trail Court.) Which includes the Grand Jury Indictment of Earl Price for murder at the 1962, Term of Effingham County, Georgia, Superior Court which is pages 5 and 6 of the record as prepared by the Clerk of the Trial Court.

3- Bill of Indictment for murder from Effingham County, Georgia, Superior Court, 1962, Term and all

notations thereon. (Pages 5 and 6 of the record as prepared by the Clerk of the Trial Court.)

4- Order of Trial Court dated October 19th, 1967, overruling the Special Plea of Autrefois Acquit. (Page 7 of the record as prepared by the Clerk of the Trial Court.)

5- Verdict of Jury dated October 17th, 1962, finding Plaintiff in Certiorari guilty of Voluntary Manslaughter fixing his punishment at 10 years minimum and 15 years maximum. (Page 6 of the record as prepared by the Clerk of the Trial Court.)

6- Plea of Not Guilty, dated October 19th, 1967, entered by Plaintiff in Certiorari. (Page 8 of the record as prepared by the Clerk of the Trial Court.)

7- Verdict of Jury dated October 20th, 1967, finding Plaintiff in Certiorari guilty of voluntary manslaughter fixing his punishment at 10 years. (Page 9 of the record as prepared by the Clerk of the Trial Court.)

8- Sentence of Effingham County, Georgia, Superior Court at the October, 1967, Term. (Page 10 of the record as prepared by the Clerk of the Trial Court.)

9- Motion of Plaintiff in Certiorari made in Effingham County, Georgia, Superior Court. (Pages 3 thru 7 of the transcript of the trial proceedings.)

10- Evidence of Honorable A. Parker Ford, Clerk of Effingham County, Georgia, Superior Court. (Pages 8 thru 25 of the transcript of the Trial proceedings.)

11- Indictment of the Grand Jury of Effingham County, Georgia, Superior Court at the October, 1962, Term of the Court charging Plaintiff in Certiorari with the offense of murder and marked "Defendant's Exhibit No. 1." (Page 29 of the transcript of the trial proceedings.)

12- A portion of the charge of the Honorable Walton Usher, Judge of Effingham County, Georgia, Superior Court, on murder to the Trial Jury. (Page 223 of the Transcript of the Trial proceedings.)

13- Enumeration of Errors as filed in the case.

14- Opinion of the Court of Appeals of Georgia dated June 25th, 1968, case number 43,747.

15- Motion for Rehearing filed in The Court of Appeals of Georgia on July 2nd, 1968.

16- Opinion of The Court of Appeals of Georgia on the Motion for Rehearing dated July 24th, 1968, case number 43,747.

17- Written notice to the Honorable Morgan Thomas, Clerk of The Court of Appeals of Georgia of intention to apply to The Supreme Court of Georgia for a Writ of Certiorari filed July 29th, 1968.

18- Application for Certiorari filed in The Supreme Court of Georgia, August 22nd, 1968.

19- Order of The Supreme Court of Georgia denying the Writ of Certiorari dated September 24th, 1968, case number 24,879.

20- Written notice to the Honorable Morgan Thomas, Clerk of The Court of Appeals of Georgia of intention to apply to The Supreme Court of The United States for Writ of Certiorari. (The within notice.)

Plaintiff in Certiorari is without relief other than an application for a Writ of Certiorari to The Supreme Court of The United States, all of his state remedies having been exhausted.

Plaintiff in Certiorari is entitled to a stay of the execution of his sentence, a supersedeas and a request of stay of the issuance of a remittitur of record is requested so that he may prosecute his appeal to The Supreme Court of The United States without the necessity of being incarcerated pending the appeal, all applications for a stay of the issuance of a remittitur or a supersedeas must be made to the Court whose decision is sought to be reviewed, which in this case is The Court of Appeals of Georgia.

WHEREFORE, Plaintiff in Certiorari prays that this his notice of intention to apply to The Supreme Court of The United States be filed; that the parts of the record be prepared for The Supreme Court of The United States as herein ordered and that his request for a stay of the issuance of a remittitur of record be granted.

/s/ Allyn M. Wallace
Attorney for Plaintiff
in Certiorari.

ALLYN M. WALLACE
P. O. BOX 43
SAVANNAH, GEORGIA

[Certificate of Service Omitted in Printing]

[File Endorsement (Omitted in Printing)]

IN THE SUPERIOR COURT
OF EFFINGHAM COUNTY, GEORGIA

Case Number 684

THE STATE OF GEORGIA

vs.

EARL PRICE

NOTICE OF APPEAL—Filed November 4, 1967

Notice is hereby given that EARL PRICE, defendant above named, hereby appeals to the Supreme Court of Georgia from the ruling and order entered on defendant's special plea of Autrefois Acquit entered herein October 19th, 1967 and from the judgment of conviction and sentence entered October 20th, 1967.

The offense for which defendant was convicted is voluntary manslaughter, and the sentence imposed is ten (10) years in the Penitentiary.

The Clerk will please prepare, certify and transmit to the Clerk of the Supreme Court of Georgia, the entire record in this case.

Dated at Springfield, Effingham County, Georgia, this 4th day of November 1967.

/s/ Allyn M. Wallace
Attorney for Appellant.

[Certificate of Service Omitted in Printing]

[File Endorsement Omitted in Printing]

IN THE SUPERIOR COURT OF EFFINGHAM COUNTY, GEORGIA

MURDER

STATE OF GEORGIA

—*vs.*—

EARL PRICE

PLEA OF AUTREFOIS ACQUIT—April 17, 1967

TO THE SUPERIOR COURT OF EFFINGHAM COUNTY, GEORGIA

NOW COMES THE DEFENDANT, EARL PRICE, in the above named and styled case, and, before plea and arraignment therein, files this, his special plea thereto and alleges:

1. That on the 17th day of October, 1962, in the Superior Court of Effingham County, Georgia, this Defendant was placed on trial before a jury in that court, upon an indictment for the offense of murder.

2. That after having filed a plea of not guilty to said charge, after issue in the said case was made up and submitted to the jury, and after evidence had been heard thereon in the Superior Court of Effingham County, Georgia, before the Honorable Walton Usher, the jury returned a verdict of guilty of voluntary manslaughter, the jury fixing a minimum sentence of 10 years and a maximum sentence of 15 years.

3. The defendant appealed the conviction of voluntary manslaughter to the Court of Appeals of Georgia, the same being Case No. 40,272 decided by the Court October 31, 1963, wherein the Court reversed the conviction of voluntary manslaughter upon the ground that the lower court erred in charging mutual combat as set out in Code Section 26-1014 of the Annotated Code of Georgia, the Court of Appeals of Georgia having taken the position that there was no evidence during the trial of the case of mutual combat.

4. The Defendant further shows to the Court that the indictment for murder was founded upon the same facts and the same transaction and in fact is the same indictment upon which the present case is now before the Court for trial, the Defendant, EARL PRICE, being the same person named in the indictment for murder, and this Defendant charges and alleges that having been tried and convicted of the offense of voluntary manslaughter, he was by that act of the jury acquitted of the offence of murder in the trial held in this honorable court on the 17th day of October, 1962.

5. Petitioner further says that since he was tried in this Honorable Court on the 17th day of October, 1962, under the same indictment that he is now being tried for the offensive murder and the jury, during the trial of the case on the 17th day of October, 1962, having found him guilty of voluntary manslaughter, he would be put in jeopardy of his life and liberty more than once for the same offense and that it would be a violation of his constitutional rights as guaranteed under the Constitution of the United States as well as the Constitution of the State of Georgia as set out in Code Section I-805 and 2-108 of the Annotated Code of Georgia which reads as follows:

> "I-805 (6688) INDICTMENT, PUNISHMENT, ETC. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."
>
> "2-108 (6364) Paragraph VIII. JEOPARDY OF LIFE OR LIBERTY MORE THAN ONCE FORBIDDEN.—No person shall be put in jeopardy of

life, or liberty, more than once for the same offense, save on his, or her own motion for a new trial after conviction, or in case of mistrial."

6. Petitioner attaches hereto with this special plea a copy of said indictment for murder in the Superior Court of Effingham County, Georgia, with the verdict of the jury thereon, as well as Defendant's plea of not guilty, the same being a part of this plea.

WHEREFORE, the Defendant having filed this special plea of *Autrefois* Acquit prays that this, his plea, be examined by this Honorable Court and that the indictment for murder be quashed and the Defendant dismissed.

/s/ Allyn M. Wallace
Attorney for Defendant

[*Duly sworn to by Earl Price jurat omitted in printing (all in italics)*]

ATTACHMENT TO PLEA OF ANTREFOIS ACQUIT

IN THE SUPERIOR COURT OF
EFFINGHAM COUNTY, STATE OF GEORGIA

INDICTMENT—Murder

The Grand Jurors, selected, chosen and sworn for the County of Effingham to-wit

1 Robert E. Graham Foreman

2 Calvin L. Seckinger
3 J. W. Exley, Sr.
4 Rupert L. Seckinger
5 Arnett A. Graham
6 J. F. Edwards, Jr.
7 Charlie Toshack
8 James Zittrouer
9 Lou Dean Hinely, Sr.
10 John Henry Zipperer
11 N. M. Arnsdorff
12 H. H. Reiser
13 Howard E. Wilson
14 Russell Pittman
15 Woodrow W. Oglesby
16 Waring D. Exley
17 C. M. Weaver
18 L. L. Durrance
19 Alton W. Exley
20 Burley L. Conaway
21 Perry M. Seckinger
22 C. A. Jerald
23 _____

In the name and behalf of the citizens of Georgia, charge and accuse Earl Price of the County and State aforesaid with the offense of.

MURDER

for that the said Earl Price on 18th day of August, in the year of our Lord Nineteen Hundred and Sixty-Two, in the County and State aforesaid, did then and there, unlawfully, and with force and arms, make an assault in and upon one Johnnie Mae Dupree in the peace of God and said State then and there being, then and there unlawfully, feloniously, wilfully and of his malice aforethought, did kill and murder by cutting and stabbing the said Johnnie Mae Dupree with a certain knife which the said Earl Price then and there held, and giving to the said Johnnie Mae Dupree then and there a mortal wound, of which mortal wound the said Johnnie Mae Dupree died.

And so the Jurors aforesaid, upon their oath aforesaid, do say that the said Earl Price the said Johnnie Mae Dupree in manner and form aforesaid, unlawfully, feloniously, wilfully and of his malice aforethought, did kill and murder, contrary to the laws of said State, the good order, peace and dignity thereof.

Effingham Superior Court
October Term, 1962

H. B. LINDSEY
Prosecutor
Special Presentment

COHEN ANDERSON
Solicitor-General

No. 684

EFFINGHAM SUPERIOR COURT
OCTOBER TERM, 1962

THE STATE

vs.

EARL PRICE

MURDER

TRUE BILL

R. E. GRAHAM, Foreman
H. B. LINDSEY, Prosecutor

COHEN ANDERSON
Solicitor-General

WITNESSES FOR THE STATE

Pauline Wilkerson
Guessman Johnson
Ethel Lee Johnson
Wiley Bailey
Betty Ann Dupree
Dr. Sowell
H. B. Lindsey
Frank Rahn

The Defendant, _____

waives copy of Indictment and list of witnesses; also waives being formally arraigned and pleads not guilty.

COHEN ANDERSON
Solicitor-General

ALLYN M. WALLACE
Defendant's Attorney.

Oct. 17, 1962

We the Jury find the defendant Earl Price guilty, of Voluntary Manslaughter and fix the penalty at a minimum of ten (10) years and a maximum of fifteen (15) years.

This 17th day of October, 1962.

SAM F. JONES, Foreman

IN THE SUPERIOR COURT OF EFFINGHAM COUNTY, STATE OF GEORGIA

STATE OF GEORGIA

vs.

EARL PRICE

ORDER OVERRULING PLEA OF AUTREFOIS ACQUIT—
October 19, 1967

The within AUTREFOIS ACQUIT having been filed in the Court and after hearing evidence and argument of Attorneys for the State of Georgia and the Defendant, EARL PRICE, the same is overuled, this 19th day of October, 1967.

WALTON USHER
Judge Effingham
Superior Court

The defendant being formally arrained, pleads not guilty, 10/19/67.

ALLYN M. WALLACE
Defendants Atty.

We, the Jury find the Defendant guilty of Voluntary Manslaughter and fix his punishment at ten (10) years.

October 20, 1967

Foreman
T. W. BRAGG, JR.

IN THE SUPERIOR COURT
OF EFFINGHAM COUNTY, GEORGIA

FELONY OR STATE MISDEMEANOR SENTENCE

Case No. 684

Charge Murder

October Term, 1967

THE STATE

vs.

EARL PRICE

JURY VERDICT: GULITY OF VOLUNTARY MANSLAUGHTER—
October 20, 1967

WHEREUPON it is ordered and adjudged by the Court that the Defendant EARL PRICE be taken from the Bar of the Court to the jail of EFFINGHAM County, and be there safely kept until a sufficient guard is sent for him from the State Penal System and be then delivered to, and be by said guard taken to such penal institution in said system as the Director of Corrections may direct, where he, the said defendant, shall be confined at labor for a term of TEN (10) YEARS to be computed according to law.

Other special conditions ordered by the Court are as follows:

The defendant, EARL PRICE, was represented in this matter by the Honorable ALLYN M. WALLACE, Attorney at Law, CHATHAM, County.

By the Court
October 20th 1967

/s/ Walton Usher
Judge Superior Court Presiding Effingham County, Georgia

Solicitor General

[fol. 3] IN THE SUPERIOR COURT
OF EFFINGHAM COUNTY, GEORGIA

STENOGRAPHER'S NOTE: When the solicitor general called the case of The State of Georgia vs. Earl Price, charged with murder, the following transpired:

TRANSCRIPT OF TESTIMONY—October 19, 1967

MR. ANDERSON: The State's ready.

MR. WALLACE: I have a motion to make outside the presence of the jury.

* * * *

MOTION BY DEFENDANT

MR. WALLACE: Now, if Your Honor pleases, to perfect the record, I would like to state that this morning, on October 19th, 1967, the Honorable Cohen Anderson, Solicitor General of the Ogeechee Judicial Circuit, in Effingham County Superior Court, called the case of [fol. 4] The State of Georgia vs. Earl Price. On that arraignment I made the statement to the Court that before we were called upon to plead, I would like to have a motion that has been filed with this Court previously to this time, in the nature of an autrefois acquit heard by the Court and passed upon and decided by the Court before we entered into the actual trial of the case. I would also like for the record to show that this is being done and heard by this Honorable Court prior to the striking of the jury, and almost immediately after the announcement of the case by the Solicitor General of this Circuit.

I would like also to state in the record that at the October (give me just a second) that the motion and plea in the nature of the autrefois acquit was filed in this Court on the 17th day of April, 1967, and my position is in this matter that at the October 1962 term of the grand jury of Effingham County, under indictment number 684, rendered a true bill charging the defendant with murder of one Johnnie Mae Dupree. That case

came on for trial in October of 1962, he was present, he was arraigned and he plead not guilty. He was tried before a jury in Effingham County, the Superior Court, the jury saw fit not to find him guilty of murder but of a lesser offense Manslaughter, and if I may read into the record my petition addressed to this Honorable Court. Now comes the defendant, Earl Price, in the above—

THE COURT: Mr. Wallace, that was voluntary manslaughter, wasn't it. Did you say Voluntary Manslaughter?

[fol. 5] MR. WALLACE: I didn't say which, I just said manslaughter. If Your Honor please, it was Voluntary Manslaughter. Let the record show that he was found guilty of Voluntary Manslaughter on October 17th, 1962, by a jury verdict. Now comes the defendant, Earl Price, if I may read the petition, it's very short. Now comes the defendant, Earl Price, in the above and styled case and before plea and arraignment therein, files this, his special plea thereto and alleges:

1. That on the 17th day of October, 1962, in the Superior Court of Effingham County, Georgia, this defendant was placed on trial before a jury in that court, upon an indictment for the offense of murder.

STENOGRAPHER: Did you say the 7th or 17th?

MR. WALLACE: 17th.

2. Two of the petition, paragraph 2. That after having filed a plea of not guilty to said charge, after issue in the said case had been made up and submitted to the jury, and after evidence had been heard thereon in the Superior Court of Effingham County, Georgia, before the Honorable Walton Usher, the jury returned a verdict of guilty of voluntary manslaughter, the jury fixing a minimum sentence of 10 years and maximum sentence of 15 years.

3. The defendant appealed the conviction of voluntary manslaughter to the Court of Appeals of Georgia, the same being Case No. 40,272 decided by the Court October 31, 1963, wherein the Court reversed the conviction of [fol. 6] voluntary manslaughter upon the ground that the lower court erred in charging mutual combat as set out in Code Section 26-1014 of the Annotated Code of Geor-

gia, the Court of Appeals of Georgia having taken the position that there was no evidence during the trial of the case of mutual combat.

4. The defendant further shows to the Court that the indictment for murder was founded upon the same facts and the same transaction and in fact is the same indictment upon which the present case is now before the Court for trial, the defendant, Earl Price, being the same person named in the indictment for murder, and this defendant charges and alleges that having been tried and convicted of the offense of voluntary manslaughter, he was by that act of the jury acquited of the offense of murder in the trial held in this honorable Court on the 17th day of October, 1962.

5. Petitioner further says that since he was tried in this Honorable Court on the 17th day of October, 1962, under the same indictment that he is now being tried for the offense of murder and the jury, during the trial of the case on the 17th day of October, 1962, having found him guilty of voluntary manslaughter, he would be put in jeopardy of his life and liberty more than once for the same offense and that it would be a violation of his constitutional rights as guaranteed under the Constitution of the United States as well as the Constitution [fol. 7] of the State of Georgia as set out in Code Section 1-805 and 2-108 of the Annotated Code of Georgia which reads as follows: As to the Federal Constitution item 1-805 Indictment, Punishment, ect. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

6. Petitioner attaches hereto with this special plea a copy of said indictment for murder in the Superior Court

of Effingham County, Georgia, with the verdict of the jury thereon, as well as defendant's plea of not guilty, the same being a part of this plea.

Wherefore, the defendant having filed this special plea of autrefois acquit prays that this, his plea, be examined by this Honorable Court and that the indictment for murder be quashed and the defendant dismissed. And that plea, if the Court pleases, and may the record show, was verified by the defendant, Earl Price.

Now, if I may, if the Court pleases, I'd like to put Mr. Ford on the witness stand to make some identifications and perfect the record. Will you take the stand, [fol. 8] please, sir. Will you take the stand, please, sir.

A. PARKER FORD, after first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WALLACE

Q You are Mr. A. Parker Ford?

A Yes.

Q Where do you live, Mr. Ford?

A Springfield, Georgia.

Q What is your connection with Effingham County, Superior Court?

A Clerk of the Superior Court.

Q You were in the courtroom this morning, were you not, when the Honorable Cohen Anderson called the case of The State of Georgia vs Earl Price?

A Yes, I was.

Q Did you or did you not hear him say that he was to be tried for murder?

THE COURT: Mr. Wallace, I think the Court would say that the solicitor general did make an announcement in open court that he charged the man with murder and that he would be tried on the original indictment for murder. Would that complete the record for you?

[fol. 9] MR. WALLACE: Yes, sir.

THE COURT: That's the way the Court heard it, at least, the Clerk may not have heard it.

Q Mr. Ford, I hand you a document, which is a presentment made by the Effingham County grand jury at

the October, 1962, term of this Court, charging Earl Price, who was present in court, with the murder of Johnnie Mae Dupree on the 8th of August, on the 18th day of August, 1962. Will you look at that indictment, please, sir, and tell me if that is an official document in your court and in your custody (witness examining document)?

A Yes, it is.

Q And does that indictment, is that an indictment of the Effingham County grand jury, at the October 1962 term?

A Yes.

Q Does that indictment charge Earl Price with murder in that he murdered Johnnie Mae Dupree, one Johnnie Mae Dupree?

A Yes.

Q Would you tell us, please, sir, the number of that indictment?

A No. 684.

Q Does that, is that the indictment which Earl Price [fol. 10] was tried in Effingham county superior court in October of 1962?

A Yes.

Q Do you have any other indictment in your possession or in your custody or in the court, so far as you know, charging Earl Price with murder other than this one document or indictment?

A That's the only one I have.

Q Is that indictment now in this Court and before this Court, is that the indictment which is now in this Court and before this Court on which Earl Price is being tried for murder?

A Yes, to the best of my knowledge.

Q Is the jury verdict on that indictment, let me ask you this, strike that, was Earl Price tried in Effingham County superior court on October 17th, 1962?

A Correct.

Q Were you present at that trial?

A Yes.

Q Were you the Clerk of this Court at that trial?

A Yes.

[fol. 11] Q You yet have the indictment in your hand, is the jury verdict reflected on that indictment (witness examining document)?

A Pardon?

Q Is the jury verdict reflected or on that indictment?

MR. ANDERSON: Your Honor, we have that concealed at this time, getting ready for this trial. We can stipulate that the verdict does appear.

MR. WALLACE: Well, I have a copy of it here if you'll permit me, if you'll agree to let him read that?

MR. ANDERSON: That's all right.

Q Does that indictment have on it the jury verdict of its 1962 October trial (witness examining document)?

A Yes.

Q Would you read it please, sir, for the record, in its entirety?

A We the jury find the defendant Earl Price guilty of voluntary manslaughter and fix his penalty at a minimum of 10 years and a maximum of 15 years. This 17th day of October, 1962. Signed Sam F. Jones, Foreman.

Q And that is a true and correct verdict that was rendered by the jury at that time?

A Yes.

MR. WALLACE: Now, if Your Honor pleases, I'd [fol. 12] like to introduce in evidence the indictment itself and ask Mr. Ford to verify the copy that I have attached to the pleadings to determine whether or not it reflects a true and correct copy and if it does, we can substitute it in place of the original indictment.

THE COURT: It would be in the record any way.

MR. WALLACE: Yes, sir, well, it's a part of it.

Q Would you glance at it, Mr. Ford, and tell me whether or not, in your opinion, that is a true copy of the indictment that you have in your possession charging Earl Price with murder as returned by the October 1962 grand jury of Effingham County Superior Court (witness examining document)?

A It looks like this statement here has been left off (indicating).

Q Well, if that's inserted, with the permission of the Court, would that be a true copy of the indictment as you have here in this Court (referring to document)?

A On the face of it, it looks like it is, yes. I couldn't tell you without seeing what's covered up.

STENOGRAPHER: I didn't get the last of it, I couldn't tell you what?

THE COURT: Mr. Wallace, did you make a copy of that?

MR. WALLACE: Yes, sir.

THE COURT: Do you state in your place that it is [fol. 13] a copy of it?

MR. WALLACE: I'll state in my place that it is a true and correct copy except, I believe they added Dr. Sowell, H. B. Lindsey, Frank Rahn, waive copy of indictment and list of witnesses.

A I've just added that.

MR. ANDERSON: I've just added that list of witness.

MR. WALLACE: Oh, you just added that, that has just been recently added, that's why it wasn't on there.

THE COURT: Well, if you state it's a copy, we'll let it go in evidence.

MR. WALLACE: Yes, sir, I'll stand in my place and say that it is a correct copy of the indictment.

THE COURT: All right.

STENOGRAPHER: Well, now, you want it to go in instead of the original?

THE COURT: It's in the pleadings.

STENOGRAPHER: I know, but he said he wanted to introduce it in evidence.

MR. WALLACE: I do want to introduce it in evidence, yes.

THE COURT: But he wants to put a copy in the place of the original in the evidence.

STENOGRAPHER'S NOTE: Document identified as Defendant's Exhibit No. 1, offered and admitted in evidence, hereto attached and made a part of this transcript.

[fol. 14] Q Let me ask you this, Mr. Ford, I overlooked this—

THE COURT: Mr. Wallace won't it be simplier, the original indictment will be in the files of the Clerk when

the case is tried, wouldn't it be simplier just to say we'll let the Court Reporter substitute a copy of the original indictment?

MR. WALLACE: Yes, sir, that was my purpose in introducing it.

THE COURT: She can make a photostatic copy of it.

MR. WALLACE: Yes, sir, that's all right.

STENOGRAPHER: But I still need to mark it.

THE COURT: She needs to mark it. You'll probably then have to put what's been wrote in or on it.

MR. WALLACE: Yes, sir, we'll put it on it. Just add two names and what he said he put on it.

THE COURT: All right.

Q Now, Mr. Ford, your records in the Clerk's office of Effingham Superior Court, show that this case was appealed to the Court of Appeals of the State of Georgia in Atlanta?

A Yes.

Q Will your records show the case number of the Court of Appeals in this case?

A Yes. But that's the remittitur and I don't find a number on it.

[fol. 15] STENOGRAPHER: I can't hear you, Parker.

A I say I don't find a number on the remittitur.

MR. WALLACE: May I state in my place, and it will be verified later, that the case number in the Court of Appeals is 40,272? That can be verified by the record.

THE COURT: His records wouldn't show the Court of Appeals number, except on the remittitur I reckon when it came down.

A Judge, we don't find it on the remittitur.

THE COURT: Do you have the remittitur?

A Yes, sir.

THE COURT: Well that would show the number.

STENOGRAPHER: It's not on there.

A It's not on there. I looked and it's not on there.

THE COURT: (Examining document) I see.

Q Mr. Ford, then that case was appealled, the Earl Price case, that was tried in October, 1962, to the Court of Appeals in Atlanta, is that correct?

A Yes.

Q And do you know whether or not that conviction was reversed?

A Yes.

Q The conviction of Earl Price in Effingham Superior Court, October 1962 term?

[fol. 16] A Yes.

Q It was appealled, was it not?

A Yes.

Q And was it reversed by the Court of Appeals?

A Yes.

Q And is that now the same case that's before the Court now for trial?

A Yes.

Q Now, I hand you a document, will you please, sir, tell us what that is and the date of it and read the decision of the Court (witness examining and reading from document)? Tell us what it is?

A This is the remittitur from the Court of Appeals of the State of Georgia, dated, Atlanta, Georgia, October 31, 1963. And the following judgment was rendered: The State vs Earl Price. This case before this court on a writ of error from the Superior Court of Effingham County, and the argument had, it is considered and adjudged that the judgment of the court below be reversed because the court erred in overruling the motion for a new trial. Nichols, Frankum and Jordan concur.

[fol. 17] Q And that is an official document in your possession and in your, in the Clerk's office of Effingham Superior Court of which you are the Clerk?

A Yes.

MR. WALLACE: I'd like to present this in evidence, if Your Honor please.

THE COURT: Was there ever a judgment taken in, by the Court after that remittitur came down?

MR. WALLACE: I believe the remittitur is supposed to be signed by Your Honor, that's my understanding. I don't believe you ever signed it, sir.

THE COURT: I don't sign the remittitur but there's supposed to be a judgment taken on the remittitur. I don't know whether one has ever been taken or not.

MR. WALLACE: I don't recall having drawn one. I would like to put that in evidence.

THE COURT: All right, sir.

STENOGRAPHER'S NOTE: Document identified, offered and admitted in evidence as Defendant's Exhibit No. 2. Copy hereto attached and made a part of this transcript.

Q Now, Mr. Ford, to the best of your knowledge and belief, is the Earl Price that's now before this Court to be tried for murder one, and the same person who was here in October 1962 and tried for the offense of Murder on the same offense that is outlined on the indictment that is now in your possession?

[fol. 18] A I have your word that's Earl Price but I don't recall what he looked like when he was in Court in 1962.

Q But there's been no other name added or taken from that indictment against Earl Price?

A That's right. No.

MR. WALLACE: Now, Your Honor, that seems to complete the record and I would like to respectfully call to Your Honor's attention two cases, one in particular from the United States Supreme Court as published in Lawyers' Addition 2nd, U.S. 355 I believe it is, 355, it's the case of Everett D. Greene petitioner, vs United States of America. It was a case that was tried in the District of Columbia in the lower court. The defendant was charged with murder, he was tried and convicted of a lesser offense, I believe they call it second degree murder. The Court, on appeal, when the case came back, he appealed for a new trial and the new trial was granted, he was tried and again convicted for manslaughter, second degree murder as they called it, the case went to the United States Supreme Court and it was decided December 16th, 1957, the case itself is rather long, but if Your Honor pleases, I would like to read the excerpts and the head notes, a few of them in the interest of time, to get my point over to the Court. Item No. 1. The provisions of the 5th Amendment against double jeopardy is de-

[fol. 19] signed to protect and individual, an individual where, from being subjected—

THE COURT: —wait just a minute, Allyn, what was it you wanted, Mr. Fetzer?

MR. FETZER: I just wanted to know where he was reading from.

MR. WALLACE: May I start over again. No. 1, headnote number 1. The provisions of the 5th Amendment against double jeopardy is designed to protect an individual from being subjected to the hazzards of trial and possible conviction more than once for an alleged offense. The underlying idea is that the State, with all its resources and powers, should not be allowed to make repeated attempts to convict an individual for an alleged offense thereby subjecting him to embarrassment, expense and ordeals, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility of even though innocent he may be found guilty. Headnote Number 2. Under the 5th Amendment probation against double jeopardy, a verdict of acquittal even when not followed by a judgment is a bar to a subsequent prosecution for the same offense. Then, I'll skip this, if Your Honor pleases, to headnote No. 9. For purposes of the rule against former jeopardy, a case in which a jury returns instructions on both first and second degree murder, returns a verdict of guilty for second degree murder, cannot be treated differently from [fol. 20] a situation in which the jury specifically finds that the defendant is not guilty of murder in the first degree but guilty of murder in the second degree. Headnote No. 10. A defendant, who, on a charge of first degree murder, was convicted of second degree murder, does not waive his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a successful appeal of his improper conviction of second degree murder. That is the Price case, sir. Then I skip to Headnote No. 16. Where a defendant is charged with two offenses, neither of which is a lesser offense included within the other, and has been found guilty of one, but not on the second, he cannot be tried again on the second, even though he secures reversal of the conviction, and even though the two offenses are related offenses charged in the same indictment. Now, so much for the headnotes. Now, I do have a small portion of the wording of the Court that I would like to call to Your Honor's attention, which is not too long.

STENOGRAPHER: What page is that?

MR. WALLACE: It's page 205 in the same case, Greene vs United States. In this case, however, we have a much different question, much different question. At Greene's first trial, the jury was authorized to find him guilty of either, for either first degree murder, (killing one, killing while perpetrating a felony) or alternatively a second degree murder, killing with malice or afore-[fol. 21] thought. The jury found him guilty of second degree murder but on his appeal that conviction was reversed and the case remanded for a new trial. At this new trial Greene was tried again, not for second degree murder but for first degree murder. Even though the original jury had previously found him guilty, had refused to find him guilty on that charge, and it was in no way involved in his appeal. For the reasons stated hereafter, we conclude that the second trial for first degree murder placed Greene in double jeopardy for the same offense in violation of the constitution. Greene was put in direct peril of being convicted and punished for first degree murder at the first trial. He was forced to run the garpent once on that charge and the jury refused to convict him. When given the choice of doing, of finding him guilty of either first degree or second degree murder, he, they chose the latter, it chose the latter. In this situation a great majority of the cases in this country have regarded jurys' verdict an an emplicit acquittal on a charge of first degree murder but the result in this case need not rest alone on the assumption which we believe legitimate, that the jury for want, for one reason or another, acquitted Greene of murder in the first degree, for here the jury was dismissed without retaining any express verdict on that charge and without Greene's consent, yet it was given a full opportunity to return a verdict and no extra ordinary circumstances appeared which it pre-[fol. 22] vented it from doing so, which prevented. Therefore, it seems clear under a status of former jeopardy, that Greene's jeopardy was first degree murder came to an end when the jury was discharged so that he could not be retried for that offense. Now, I don't think there is any need to read any further, and I would like to call Your

Honor's attention to a more recent case, which is right on the point, and I will not take the Court's time to read those headnotes, and that is the case of United States of America vs Walter Hitch Wilkins, Warden, State Prison. This came out of the 2nd Circuit Court of Appeals. It's a New York case and I have these notes market, and I may read one of them in this case. This case was decided July 13th, 1965 in the Federal Court, having been tried in the State court in New York, and was carried to the Circuit Court. This is Headnote 15 in this case. In view of the fact that the State was constitutionally forbidden to prosecute a case for first degree murder barring completion of the first trial at which he had been convicted of second degree murder and there was a reasonable possibility that the conduct of the third trial in deliberation of the jury were affected by the fact that the third trial had been for first degree murder of the accused who was convicted of second degree murder at a third trial, was being held in custody in violation of due process of laws. Now, to bring it to an end, if Your Honor pleases, it's our position that under these decisions it would be a violation of this man's rights to [fol. 23] again try him, under the Federal Statute and this comes, this all comes in, and these cases tell you that the 4th and 5th amendment of the Constitution of the United States are applicable to State laws through the 14th amendment of the Constitution of the United States. They specifically tell you that. Now, I realize under State law that State law says try him. I've found nothing, I found a couple of cases but I didn't bring the citations with me, who almost, not on murder cases, but on other cases, almost say the same thing, but I must frankly admit to the Court that under State laws it says try him for murder the second time, but I would like to be the one to try to change that rule if I could. I think would be a distinction. Now, we say that to try him at this term of the Court, this October 1967 term of Court, when he was tried at the October 1962 term of the Court and was, in effect, acquitted of murder, that to again try him for murder for the same offense, upon the same indictment, would be a violation of this Constitution, of his

constitutional rights and for that reason we ask the Court to quash the indictment.

THE COURT: Do you want to say anything Mr. Anderson, for the record?

STENOGRAPHER'S NOTE: The witness Parker Ford was excused as a witness.

MR. ANDERSON: If the Court please, our Georgia Courts have not yet held that we should reindict a person [fol. 24] having been convicted for an offense, for a lesser offense than that in the indictment, and a retrial is demanded, our Georgia Courts say you can still try them on the old indictment and for the same charge as originally indicted for. Now, what the Federal courts will do with it, I don't know.

MR. WALLACE: If Your Honor pleases, if I may refresh, if I may respectfully interrupt Mr. Anderson, I don't think our, I don't think we've reached that point yet about trying them under the same indictment. I've got some law on that. I think the issue, if I may call your attention to, as to whether or not it's a violation of his constitutional rights the 5th amendment constitutional rights, in attempting to comment on murder, regardless of whether or not the charge is for a lesser offense under the present indictment of murder.

MR. ANDERSON: Our Georgia courts have held that we try him and I know of no law which says that I must reindict.

THE COURT: In view of the law which Mr. Wallace has cited, do you still elect to try him for murder rather than voluntary manslaughter?

MR. ANDERSON: Well, I couldn't try him for anything less because he's indicted for murder, and I can't try him for anything less than what he's indicted for.

MR. WALLACE: Well, now, since Mr. Anderson has injected that in it, I'd like to call this to Your Honor's attention, it's an old case, 2 Georgia Appeals, 283 page [fol. 25] 285. An indictment cannot be amended except by grand jury before arraignment.

THE COURT: I'll overrule your motion, Mr. Wallace.

MR. WALLACE: All right, sir, and I respectfully, Mrs. Johnson, for the record, except to the Court's ruling.

THE COURT: Before we bring the jury back, let me ask you another question.

STENOGRAPHER: Do you want this in the record?

THE COURT: Yes, put this in the record, it's with reference to the same case. Have you checked the grand jurors who were named in the old indictment against the jury that we have here?

MR. WALLACE: Yes, sir, there's about three on the grand jury and about three on the trial jury. I have them marked and I'd appreciate it if Your Honor would—

THE COURT: —what I'm trying to do is ascertain if we can start the trial of this case at nine o'clock in the morning rather than try it this afternoon.

MR. WALLACE: I think it would be all right.

THE COURT: I don't think we'll be able to try it this afternoon and get through with it at a reason—about hour tonight, and I'm not much on holding Court at night and I don't have any place to put these jurors to spend the night. What I would like to do though is get rid of these jurors who are * * *

DEFENDANT'S EXHIBIT No. 1

STATE OF GEORGIA, EFFINGHAM COUNTY
IN THE SUPERIOR COURT OF SAID COUNTY

INDICTMENT—Murder

The Grand Jurors, selected, chosen and sworn for the County of Effingham to-wit

1 Robert E. Graham Foreman
2 Calvin L. Seckinger
3 J. W. Exley, Sr.
4 Rupert L. Seckinger
5 Arnett A. Graham
6 J. F. Edwards, Jr.
7 Charlie Toshack
8 James Zittrouer
9 Lou Dean Hinely, Sr.
10 John Henry Zipperer
11 N. M. Arnsdorff
12 H. H. Reiser
13 Howard E. Wilson
14 Russell Pittman
15 Woodrow W. Oglesby
16 Waring D. Exley
17 C. M. Weaver
18 L. L. Durrance
19 Alton W. Exley
20 Burley L. Conaway
21 Perry M. Seckinger
22 C. A. Jerald
23 _____

In the name and behalf of the citizens of Georgia, charge and accuse Earl Price of the County and State aforesaid with the offense of

MURDER

for that the said Earl Price on 18th day of August, in the year of our Lord Nineteen Hundred and Sixty-Two, in the County and State aforesaid, did then and there, unlawfully, and with force and arms, make an assault in and upon one Johnnie Mae Dupree in the peace of God and said State then and there being, then and there unlawfully, feloniously, wilfully and of his malice aforethought, did kill and murder by cutting and stabbing the said Johnnie Mae Dupree with a certain knife which the said Earl Price then and there held, and giving to the said Johnnie Mae Dupree then and there a mortal

wound, of which mortal wound the said Johnnie Mae Dupree died.

And so the Jurors aforesaid, upon their oath aforesaid, do say that the said Earl Price the said Johnnie Mae Dupree in manner and form aforesaid, unlawfully, feloniously, wilfully and of his malice aforethought, did kill and murder, contrary to the laws of said State, the good order, peace and dignity thereof.

Effingham Superior Court
October Term, 1962

H. B. LINDSEY
Prosecutor
Special Presentment

COHEN ANDERSON
Solicitor-General

2/320
2/369

EFFINGHAM SUPERIOR COURT
OCTOBER TERM, 1962

No. 684

THE STATE

vs.

EARL PRICE

MURDER

TRUE BILL

R. E. GRAHAM, Foreman
H. B. LINDSEY, Prosecutor

COHEN ANDERSON
Solicitor-General

The defendant being formally arraigned pleads not guilty, 10/19/67.

/s/ Allyn M. Wallace
Defendant's Attorney.

WITNESSES FOR THE STATE

Pauline Wilkerson
Guessman Johnson
Ethel Lee Johnson
Willie Bailey
Betty Ann Dupree
Dr. Sowell
H. B. Lindsey
Frank Rahn

The Defendant, _____ waives copy of Indictment and list of witnesses; also waives being formally arraigned and pleads not guilty.

COHEN ANDERSON
Solicitor-General

ALLYN M. WALLACE
Defendant's Attorney.

Oct. 17, 1962

We, the Jury find the defendant Earl Price guilty of Voluntary Manslaughter and fix the penalty at a minimum of ten (10) years and a maximum of fifteen (15) years.

This 17th day of October 1962.

SAM F. JONES, Foreman

CHARGE OF THE COURT (EXCERPT)

Gentlemen, in all criminal trials the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case.

The particular charge in this bill of indictment is that of murder. I charge you that murder is the unlawful killing of a human being in the peace of the State by a person of sound memory and discretion with malice aforethought either express or implied.

Malice, as referred to by the Court, and as defined by law, simply means that unlawful intention to take away the life of a fellow creature under circumstances where the law neither justifies, mitigates or excuses.

Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof.

Malice shall be implied where no considerable provocation appears, and where all of the circumstances of the killing show an abandoned and a malignant heart.

If you believe that the defendant on trial killed the person named in the indictment in the manner therein charged * * *

IN THE SUPREME COURT OF GEORGIA

Case Number 24,570

EARL PRICE, APPELLANT

vs.

STATE OF GEORGIA, APPELLEE

ENUMERATION OF ERRORS—Filed March 12, 1968

AND NOW COMES the Appellant and files this his enumeration of errors which he alleges the Court committed and shows:—

1—That the Court erred in overruling the Defendants Special Plea of Autrefois Acquit, heard and disposed of in the Court prior to the arraignment and before pleadings to the merits and before the selection of the Jury.

2—That the Court erred in denying the Defendant his Constitutional rights as guaranteed under the Fifth and Fourteenth Amendments of the Constitution of the United States, in that he was tried for murder twice under the same indictment, the Defendant having been acquitted at the first trial for murder when he was found guilty of voluntary manslaughter by the Jury, being placed in jeopardy of life and liberty more than once for the same offense.

3—That the verdict is contrary to the evidence and without evidence to support it.

4—That the verdict is decidedly and strongly against the weight of evidence.

5—That the verdict is contrary to the law and principles of justice and equity.

6—That the Court erred in charging the Jury on voluntary manslaughter and in instructing the Jury that they may convict the Defendant of that offense.

7—That the Court erred in admitting the testimony of the Sheriff of Effiingham County, Georgia, concerning his opinion as to how the homicide was committed.

8—That the Court erred in denying Appellant who is an indigent, a copy of the transcript of the record and in

cancelling its order of November 11th, 1967, the Court having previously entered an order on the 11th day of November, 1967 ordering the official Court Stenographer to furnish Appellant's attorney a full and complete transcript of the record.

The reason that said case is being filed in the Supreme Court of Georgia is because there is a Constitutional question involved in the case, the Supreme Court of Georgia in such cases being vested with exclusive jurisdiction.

Respectfully submitted,

/s/ ALLYN M. WALLACE
Attorney for Appellant

[Certificate of Service Omitted in Printing]

IN THE SUPREME COURT OF GEORGIA

Case # 24,570

EARL PRICE, APPELLANT

vs.

STATE OF GEORGIA, APPELLEE

ENUMERATION OF ERRORS

ORIGINAL

Filed in Office, March 12, 1968

/s/ Henry H. Cobb,
C.S.C. Ga.

ALLYN M. WALLACE
Attorney at Law
Savannah, Ga.

43747

COURT OF APPEALS OF GEORGIA

Filed in Office, May 7, 1968

/s/ Morgan Thomas
Clerk Court of Appeals of Georgia

SUPREME COURT OF GEORGIA

Case No. 24879

Filed in Office

/s/ Henry H. Cobb
C.S.C. Ga.

IN THE COURT OF APPEALS OF THE STATE OF GEORGIA

43747
J-58

PRICE

v.

THE STATE

OPINION—June 25, 1968

JORDAN, P.J., PANNELL and DEEN, JJ.

JORDAN, Presiding Judge. Earl Price was indicted for the murder of Johnnie Mae Dupree, convicted of voluntary manslaughter and sentenced to 10 to 15 years. On appeal to this court (Price v. State, 108 Ga. App. 581 (133 SE2d 916)) we reversed on an erroneous charge of mutual combat. Price was again placed on trial for murder under the same indictment, resulting in his conviction of voluntary manslaughter and a sentence of 10 years. From such verdict and judgment, Price appealed to the Supreme Court of Georgia. The case was transferred to this court since "only questions as to the application of plain and unambiguous provisions of the Constitution" were involved. Price v. State, 224 Ga. 306 (SE2d). Held:

1. Enumerations of error 1 and 2 complain of the overruling of defendant's special plea of autrefois acquit and the denial of his rights under the 5th and 14th amendments to the Constitution of the United States in that he was placed in jeopardy of life and liberty more than once for the same offense. These contentions have been decided adversely to the defendant in the case of Brantley v. State, 132 Ga. 573 (64 SE 676), affirmed in 217 US 284 (54 LE 768), where it was said, "When a person has been indicted for murder and convicted of voluntary manslaughter, if he voluntarily seeks and obtains a new trial, he is subject to another trial generally for the offense charged in the indictment, and upon such trial he cannot

successfully interpose a plea of former acquittal of the crime of murder, or former jeopardy in regard thereto."

2. Enumerations of Error 3, 4 and 5 relate to the general grounds and enumeration number 6 to the charge of the court on voluntary manslaughter. These contentions were fully dealt with in Price v. State, 108 Ga. App. 581, division 5 (133 SE2d 916) and the result reached there is controlling on these issues since the evidence on the second trial was substantially the same as on the first trial.

3. Enumeration of error number 7 complains that portions of the testimony of the sheriff constituted conclusions and opinions as to how the homicide was committed. Since no objections were made to this testimony during the trial, this enumeration is without merit.

4. Enumeration of error number 8 contends that the court erred in denying the indigent defendant's request for a copy of the transcript of the record. Upon the filing of the defendant's notice of appeal in this case, a transcript of the record was filed with the trial court and transmitted to this court as provided by Code Ann. § 6-805(e) without cost to the defendant. This transcript was available to defendant's attorney for use in preparing his brief and in perfecting the appeal to this court, thus affording the defendant a full and adequate review without regard to his ability to pay. This situation is not within the ambit of such cases as Griffin v. Illinois, 351 US 12 (100 LE 891) and Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214 (2 LE 1269) relied upon by the defendant.

Judgment affirmed. Pannell ad Deen, JJ., concur.

A

ON MOTION FOR REHEARING—July 24, 1969

The defendant vigorously insists that the 1909 decision in Brantley v. State, 132 Ga. 573 (64 SE 676), affirmed in 1910 by the United States Supreme Court in 217 US 284 (54 LE 768), is no longer controlling as the law of this State, in view of the 1957 decision of the United States Supreme Court in Green v. United States, 355 US 184 (2 LE2d 199; 78 SC 221, 61 ALR2d 1119) and the 1965 decision of the United States Court of Appeals, Second Circuit, in United States v. Wilkins, 348 F2d 844.

In the Green case the Supreme Court determined that a defendant charged with first degree murder in the District of Columbia and convicted of second degree murder, who obtained a new trial and was convicted on the second trial of first degree murder, was placed in jeopardy twice for the same offense in violation of the Fifth Amendment of the Constitution. In a footnote (2 LE2d 208, n. 15) the court distinguished the Brantley case because it involved a trial in a state court.

In the Wilkins case, the petitioner in habeas corpus was indicted under New York law of first degree murder, and tried three times. After successfully appealing in the New York courts his first conviction of second degree murder, and a second conviction of first degree murder, he was convicted on the third trial of second degree murder, and imprisoned under a sentence of 40 years to life. The Court of Appeals for the Second Circuit held that the State of New York transgressed the limitations of the Fourteenth Amendment in prosecuting the petition for first degree murder following the completion of the first trial, and that a reasonable possibility of prejudice existed in the third trial by the fact that he was prosecuted for first degree murder. The court ordered that the writ be granted unless within a reasonable time New York afforded the petitioner a new trial conforming to the principles set forth in the opinion. Although the United States Supreme Court denied certiorari, 338 US 913 (15 LE2d 667; 86 SC 396) this does not establish a controlling precedent of the Supreme Court on the merits.

In 1966 the Supreme Court, in Cichos v. Indiana, 385

US 76 (17 LE2d 175; 87 SC 271), rehearing denied, 385 US 1020 (17 LE2d 559; 87 SC 699) did have before it the precise question of whether the Fifth Amendment's prohibition against double jeopardy applied to a state court prosecution under the due process provisions of the Fourteenth Amendment. Instead of determining the issue, however, the court dismissed the writ of improvidently granted, taking the view that because of the indistinguishable features under Indiana law of the two offenses charged, reckless homicide and involuntary manslaughter, there being a conviction in both the first and second trials only of reckless homicide, it could not accept the petitioner's assertions that the first jury acquitted him of involuntary manslaughter and that the second trial placed him twice in jeopardy.

Earlier, in 1959, the United States Supreme Court held that the due process clause of the Fourteenth Amendment does not bar successive federal and state prosecutions for a single criminal act violating state and federal law. Bartkus v. Illinois, 359 US 121 (3 LE2d 684; 79 SC 676), rehearing denied, 360 US 907 (3 LE2d 1258, 79 SC 1283).

While the dissenting opinion of Mr. Justice Black in Bartkus (3 LE2d 705) which he adhered to while concurring in the majority opinion in Cichos, and the dissenting opinion of Mr. Justice Fortas in Cichos (3 LE2d 179) express views that may eventually become the majority opinion of the court, consonant with other opinions of the court subsequent to Bartkus with respect to due process in state court prosecutions (see Annotation, Bill of Rights in State Courts, 18 LE2d 1388, particularly §§ 2, 3, and 7[c], in which the cases are collected and discussed) the Brantley case as decided by the Georgia Supreme Court and affirmed by the United States Supreme Court, has never been expressly overruled.

Under the mandate of Article VI, § II, paragraph IV of the Georgia Constitution (Code § 2-3708) the Georgia Supreme Court and not this court has jurisdiction of a case involving the construction of the United States Constitution, and under paragraph VIII (Code § 2-3708) the decisions of the Georgia Supreme Court are binding

on this court as precedents. The Georgia Supreme Court, in line with numerous other decisions, transferred the case to this court as involving *only* the application of plain and unambiguous provisions of the United States Constitution. Price v. State, 224 Ga. 306 (SE2d). Within these limitations this court must apply the Brantley case as the controlling precedent. Accordingly, the court adheres to its original opinion.

Motion denied. Pannell and Deen, JJ., concur.

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA

Atlanta

43747

EARL PRICE

v.

THE STATE

JUDGMENT—June 25, 1968

This case came before this court on appeal from the Superior Court of Effingham County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. Jordan, P. J., Pannell and Deen, JJ., concur.

IN THE COURT OF APPEALS OF GEORGIA

Case Number 43747

Decided June 25, 1968

EARL PRICE, PLAINTIFF IN ERROR

vs.

THE STATE OF GEORGIA, DEFENDANT IN ERROR

MOTION FOR REHEARING—Filed July 2, 1968

Comes now EARL PRICE, Plaintiff in Error in the above stated case, and within the time allowed by law, files this his Motion for a Rehearing in the above styled case, and for grounds thereof says:—

1—The Court erred and overlooked a material decision, holding in this case, that "when a person has been indicted for Murder and convicted of Voluntary Manslaughter, if he voluntarily seeks and obtains a new trial, he is subject to another trial generally for the offense charged in the indictment, and upon such trial he cannot successfully interpose a plea of former acquital of the crime of murder, or former jeopardy in regard thereto," citing as authority the case of Brantley VS. the State, 132 Ga. 573 Affirmed in 217 U.S. 284, 54 L.Ed. 768.

Plaintiff in Error contends that the Brantley Case (132 Ga. 573) is not the law in the case before the Court. This rule of law, old as it is, has been set aside by recent rulings of the Federal Appellate Courts, all of which are applicable to State Courts. What was regarded as fair in one epoch of our history as a nation may be regarded as fundamentally unfair in the next. In applying fundamental fairness, Courts are required to re-evaluate prior interpretations of the due process clause of the Constitution in light of changing concepts as to minimum standards of fairness. The Brantley Case relied upon by this Honorable Court was in the year, 1910. This is the year of 1968, a time or period when the Appellate Courts are more concerned with the constitutionally protected human

rights than they were back in the year, 1910. The Brantley Case arose during what might be called a period or lull in the Courts concern of guaranteed Constitutional rights. This is a new day with new ideas, new rulings and drastic changes in old adequated laws which in substance denied citizens of their guaranteed Constitutional rights.

In the case of United States of America vs. Wilkins, reported in 348 Fed. Rep. 2d Series 844 the United States Court of Appeals, Second Circuit, held in a New York State Murder Case, that where a Defendant was convicted of second-degree murder and the conviction was reversed in the State Court, the State was *forbidden* by the Constitution from prosecuting the Defendant again for first-degree murder in the same case or crime. The mere fact that a reversal of the first trial in the present case before this Honorable Court came about and was successfully appealed by the accused, *he did not waive* his Constitutional defense of former jeopardy to a second prosecution on the first-degree murder charge. It is not a bar. This principal of law is very plainly set out in the case of United States vs. Wilkins reported in 348 Fed. Rep. 2d Series 844, and also in the case of Green vs. United States a Supreme Court of the United States decision decided December 16th, 1957, 355 U.S. 184, 2 L. Ed. 2d 199, some 47 years after the Georgia Brantley Case.

In the case of United States vs. Wilkins, 348 Fed. Rep. 2d Series, as referred to above, the Court said on pages 862 and 863 (10 and 11),

> "Thirdly, and perhaps most significantly, the authority of Brantley and the Kring dictum (even if the latter be read to reach the instant double jeopardy claim) has been tarnished by the gradual but certain evolution of our constitutional understanding of justice and fairness. Mr. Justice Frankfurter, the most eloquent and ardent contemporary advocate of the fundamental fairness standard, consistently maintained that in applying this standard the courts are permitted, *nay are required*, to re-evaluate prior interpretations of the Due Process Clause in light of

"changing concepts as to minimum standards of fairness," Green vs. United States, supra, 355 U.S. at 215, 78 S.Ct. at 238 (dissenting opinion); see also, e. g. Malinski v. New York, 324 U.S. 401, 414, 65 S.Ct. 781, 89 L. Ed. 1029 (1945) (concurring opinion); Louisiana ex rel. Francis v. Resweber, supra, 329 U.S. at 466-467, 67 S.Ct. 377-378; Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L. Ed. 183 (1952); and with this view there could be little dispute. What was regarded as fair in one epoch of our history as a nation may be regarded as fundamentally unfair in the next, even though the judgment is "not ad hoc and episodic but duly mindful of reconciling the needs of continuity and of change in progressive society," id. at 172, 72 S.Ct. at 209. Kring (1882) and Brantley (1910) reached the Supreme Court at a time when the precepts of justice emanating from the Due Process Clause of the Fourteenth Amendment were rudimentary and insensitive to outrageous imperfections in the state criminal processes. To mention but two examples, it was not until the 1930's that a state conviction was invalidated under the Due Process Clause because it rested solely "upon confessions shown to have been extorted by officers of the state by brutality and violence," Brown v. State of Mississippi, 297 U.S. 278, 279, 56 S.Ct. 461, 462, 80 L. Ed. 682 (1936), or because an accused in a capital case was denied the effective assistance of counsel, Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L. Ed. 158 (1932); and it would be naive to suppose that in the seventy year period between the adoption of the Fourteenth Amendment and these decisions, no such defects existed or were complained of. Kring and Brantley arose during this lull in the Supreme Court's concern for constitutionally protected human rights, and even if Kring and Brantley be read as declaring that this type of reprosecution is not so fundamentally unfair as to amount to a denial of due process of law, we would decline to follow them in applying the fundamental fairness standard, not merely be-

cause of their half century antiquity, but because we would not be faithful to the evolution of our societal values if we reached any other conclusion.

(11) New York was constitutionally forbidden to reprosecute Hetenyi for first degree murder following the completion of the first trial and to the extent that sections 464 and 544 of the N. Y. Code of Criminal Procedure authorize such a reprosecution, they are inconsistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution."

In the case of Green vs. United States reported in 355 US 184, 2 L ed 2d 199, pages 206 and 207 of Lawyer's edition (2 L ed 2d), the Court said:—

"Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. In this situation the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder. But the result in this case need not rest alone (355 US 191) on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense. Wade v Hunter, 336 U.S. 684, 93 L ed 974, 69 S Ct 834. In brief, we believe this case can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read:

"We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree."

After the original trial, but prior to his appeal, it is indisputable that Green could not have been tried again for first degree murder for the death resulting from the fire. A plea of former jeopardy would have absolutely barred a new prosecution even though it might have been convincingly demonstrated that the jury erred in failing to convict him of that offense. And even after appealing the conviction of second degree murder he still could not have been tried a second time for first degree murder had his appeal been unsuccessful.

Nevertheless the Government contends that Green "waived" his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a successful appeal of his improper conviction of second degree murder. We cannot accept this paradoxical contention. "Waiver" is a vague term used for a great variety of purposes, good and bad, in the law, in any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right. Cf. Johnson v Zerbst, 304 US 458, 82 L ed 1461, 58 S Ct 1019, 146 ALR 357. When a man has been convicted (355 US 192) of second degree murder and given a long term of imprisonment it is wholly fictional to say that he "chooses" to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice. And as Mr. Justice Holmes observed, with regard to this same matter in Kepner v United States, 195 US 100, 797, 1 Ann Cas 655: "Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States."

In view of what the Supreme Court of the United States has held as well as the Second Circuit Court of Appeals of the United States, it would appear beyond a shadow of a doubt that the Defendant in the present case before this Honorable Court was deprived of his constitutional rights when the Trial Court tried him for murder the second time in the same case, when in fact he had been found guilty of Voluntary Manslaughter in the first trial. The jury in effect at the first trial found him not guilty of murder. In the Green Case page 206 of 2 L ed 2d, the Court said:— "In brief, we believe this case can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which read:— "The jury finds, the Defendant not guilty of murder in the first degree but guilty of murder in the second degree."

These cases further hold that these rulings apply to all citizens of the United States under the Due Process Clause of the Fourteenth (14th) Amendment of the Constitution of the United States, and that they are applicable to State Courts. Neither of these two cases cited go along with the Brantley Case. In fact, both cases cited hold a Defendant who, on a charge of first degree murder, was convicted of second degree murder *does not waive* his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a successful appeal of his improper conviction of second degree murder.

These two cases cited in effect reverse the Georgia Brantley Case wherein it was held in substance that the Defendant in this case now before the Court, could not successfully interpose a plea of former acquital simply because he had successfully obtained a reversal of an improper conviction of Voluntary Manslaughter.

In view of these two Federal decisions Plaintiff in Error cannot rest his case on the out-dated decision of the Georgia Brantley Case. The decision in this case is out of line with present day trends of the Federal Appellate Courts and this old 1910 decision should be reversed so that Georgia Law might be in step with present day trends.

Plaintiff in Error urgently requests the Court to carefully read and consider these two Federal Cases cited and that the Court give consideration to this motion for Rehearing, because Plaintiff in Error is of the opinion that the Court has overlooked these two major material decisions in deciding this case. It is Plaintiff in Error's firm belief that The Supreme Court decisions are the Law of the land and that they supersede all other decisions of other Appellate Courts on a given question of law and while it might be said that the decision in the Brantley case of the year, 1910, is the Law of Georgia in such cases, the question is whether not this decision should be set aside in view of the Federal Court rulings, all of which are right in point and certainly applicable to the case now before this Honorable Court. The Federal cases cited in the original brief of Plaintiff in Error and again cited in this request of a Rehearing, hold conclusively and they cannot be otherwise interperted, that the Defendant in Error in this case now before the Court should not have been tried for murder for the same offense the second time in view of the verdict of the first trial even though the Defendant Voluntarily sought and obtained a reversal of his first improper conviction of Voluntary Manslaughter. The fact that the Defendant in Error was tried the second time for murder it can conclusively be said that it gave the prosecution the advantage of offering the jury a choice, a situation which is apt to induce a doubtful jury to find the Defendant guilty rather than to continue debate as to his innocence.

The Court is earnestly urged to set aside it's previous decision in this case and hold that in view of the recent Federal decisions the ruling in the Brantley case is out of line with present day decisions and trends of the Supreme Court of the United States. It is conceded that the Court of Appeals is generally bound by the decisions of the Supreme Court of Georgia until changed, set aside or modified by that Court and that most likely the Court of Appeals has no right to set the Brantley case aside but the position of Plaintiff in Error is that these recent Federal decisions have set this opinion of the Supreme Court of Georgia aside and that it is now merely an

application of the law of the Federal Courts which it is felt this Honorable Court has a right to do, most especially in view of what the Federal Courts have said on this point of law. The decision in the Brantley case is wrong, out of date and not in line with the Supreme Law of the land. It cannot stand and should not stand as the Law of Georgia.

In conclusion, the Court's attention is again directed to Head Note 10 of the Green case and the Courts comments under this Head Note wherein the Court held:— "a Defendant who, on a charge of first degree murder, was convicted of second degree murder, *does not* waive his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a successful appeal of his improper conviction of second degree murder." Is not this decision in the Green case directly opposite to the decision in the Georgia Brantley case? The other case cited and reported in 348 Fed. Rep. 2d Series 844, holds the same as in the Green case, when the Court in Head Note 20 said:— "Prosecution for first-degree murder and submission to jury of first-degree murder charge violated accused's constitutional rights not to be prosecuted for first-degree murder following completion of first trial at which he had been convicted of second-degree murder for same crime." The Court in this case referred to the Georgia Brantley case and said further that they would decline to follow the Brantley case decision in applying the fundamental fairness standard, not merely because of their half century antiquity, but because they would not be faithful to the evolution of our societal values if we reached any other conclusion.

The Court of Appeals of Georgia under Code Section 2-3708 of the Code of Georgia, is bound by the decisions of the Supreme Court of Georgia and they must follow the decisions of that Court where the issue is clearly settled by decisions of that Court. In the case now before this Honorable Court, the Court has followed the decision of the Supreme Court of Georgia in citing the Brantley case in 132 Ga. 573 on the question of former jeopardy. It is apparent that this Honorable Court had no other alternative but to do what it did on the issue raised in

this Rehearing request and as set out in Enumerations of Errors One (1) and Two (2) of the case. If this be true, then in all fairness to Plaintiff in Error and most especially in view of the recent decisions of the Federal Courts on this question which is set out in this Rehearing Request, it would appear that this matter should be submitted to the Supreme Court of Georgia, who made the law for further study and consideration of its position in the year, 1910. This case is out-dated and not in line with The Supreme Law of the land, and Plaintiff in Error most respectfully and urgently requests this Honorable Court to give serious consideration to this Motion for a Rehearing, vacating its previous ruling in the case on the question of former jeopardy and submit the matter to The Supreme Court of Georgia for direction. It is felt that this question of law involves great public concern and of matters of gravity and importance to such an extent in view of the Federal Decisions set out, that The Supreme Court of Georgia should be called upon for a further look of its decision in the Brantley case.

Respectfully submitted,

/s/ Allyn M. Wallace
Attorney for Plaintiff in Error

CERTIFICATE OF COUNSEL

I, ALLYN M. WALLACE, Attorney of Record, for EARL PRICE, Plaintiff in Error in Case Number 43,747, Court of Appeals of Georgia, do certify that upon careful examination of the Opinion of the Court, I have every belief that the facts stated and evidence quoted and the law referred to in the attached Motion for Rehearing have been overlooked by the Court, all of which are material and if considered would require a different Judgment from that rendered by the Court.

I also certify that a copy of the within and foregoing Motion for Rehearing has been served upon the Attorney General of Georgia, the Honorable Arthur K. Bolton; the Solicitor General of the Ogeechee Circuit, the Honorable Cohen Anderson; and the Honorable George W. Fetzer of Springfield, Georgia.

Certified to this 1st day of July, 1968.

/s/ Allyn M. Wallace
ALLYN M. WALLACE
Attorney for Plaintiff in Error

P. O. Box 43
Savannah, Georgia

[File Endorsement Omitted in Printing]

IN THE COURT OF APPEALS
OF GEORGIA

Case No. 24879

Supreme Court of Georgia
Filed in office, Henry H. Cobb, C-S-C Ga.

EARL PRICE, APPELLANT

vs.

STATE OF GEORGIA, APPELLEE

MOTION FOR REHEARING

ALLYN M. WALLACE
Attorney at Law
Savannah, Ga.

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA

43747

EARL PRICE

v.

THE STATE

ORDER DENYING MOTION FOR REHEARING—July 24, 1968

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

IN THE COURT OF APPEALS OF GEORGIA

No. 43,747

EARL PRICE, PLAINTIFF-IN-ERROR.

vs.

THE STATE OF GEORGIA, DEFENDANT-IN-ERROR.

NOTICE OF INTENTION TO APPLY FOR WRIT OF CERTIORARI TO SUPREME COURT OF GEORGIA.—filed July 29, 1968

TO THE CLERK OF THE COURT OF APPEALS OF GEORGIA.

You are hereby notified that it is the intention of EARL PRICE, Plaintiff-in-Error, to apply to The Supreme Court of Georgia for the Writ of Certiorari to review the Judgment of the Court of Appeals rendered and filed in the above stated case on June 25th, 1968, in which case a Motion for Rehearing was denied on July 24th, 1968. The following portions of the record are hereby ordered.

1—Notice of Appeal filed in Effingham County Superior Court. (Page 1 of record as prepared by Clerk of lower Court.)

2—Special Plea of Autrefois Acquit (Pages 2 thru 6 of record as prepared by Clerk of lower Court.) which includes Grand Jury Indictment of Earl Price for Murder at the *1962* Term of Effingham County Superior Court which is Pages 5 and 6 of the record as prepared by the Clerk of the lower Court.

3—Bill of Indictment for Murder from Effingham County Superior Court *1962* Term and all notations thereon. (Pages 5 and 6 of the record as prepared by Clerk of lower Court.)

4—Order of Court dated October 19th, 1967, overruling the special Plea of Autrefoir Acquit. (Page 7 of the record as prepared by Clerk of lower Court.)

5—Verdict of Jury dated October 17th, 1962, finding Plaintiff-in-Error guilty of Voluntary Manslaughter fixing his punishment at 10 years minimum and 15 years maximum. (Page 6 of the record as prepared by Clerk of lower Court.)

6—Plea of Not Guilty, dated October 19th, 1967, entered by Plaintiff-in-Error. (Page 8 of the record as prepared by Clerk of lower Court.)

7—Verdict of Jury dated October 20th, 1967, finding Plaintiff-in-Error guilty of Voluntary Manslaughter fixing his punishment at 10 years. (Page 9 of the record as prepared by Clerk of the lower Court.)

8—Sentence of Effingham County Superior Court at the October, *1967* Term. (Page 10 of the record as prepared by the Clerk of the lower Court.)

9—Motion of Plaintiff-in-Error made in Effingham County Superior Court. (Pages 3 thru 7 of the transcript of the trial proceedings.)

10—Evidence of Honorable A. Parker Ford, Clerk of Effingham County Superior Court. (Pages 8 thru 25 of the transcript of the trial proceedings.)

11—Indictment of the Grand Jury of Effingham County Superior Court, at the October, *1962* Term of the Court charging Plaintiff-in-Error with the offense of murder and marked "Defendant's Exhibit No. 1." (Page 29 of the transcript of the trial proceedings.)

12—A portion of the charge of the Honorable Walton Usher, Judge of Effingham County Superior Court, on murder to the trial jury. (Page 223 of the transcript of the trial proceedings.)

13—Enumeration of Errors filed in the case.

14—Opinion of the Court of Appeals of Georgia date June 25th, 1968, case number 43,747.

15—Opinion of the Court of Appeals of Georgia on Motion for Rehearing dated July 24th, 1968, case number 43,747.

16—Motion for Rehearing filed in the Court of Appeals of Georgia, July 2nd, 1968.

17—Written notice to the Honorable Morgan Thomas, Clerk of the Court of Appeals of Georgia of intention to apply to The Supreme Court of Georgia for a Writ of Certiorari.

ALLYN M. WALLACE
Attorney for Plaintiff-in-Error, Earl Price

[Certificate of Service Omitted in Printing]

[File Endorsement Omitted in Printing]

Case No. 43,747

IN THE COURT OF APPEALS OF GEORGIA.

Case No. 24879

Supreme Court of Georgia
Filed in office, Henry H. Cobb, C-S-C Ga.

EARL PRICE, PLAINTIFF IN ERROR.

vs.

THE STATE OF GEORGIA, DEFENDANT IN ERROR.

NOTICE OF INTENTION TO APPLY TO THE SUPREME COURT OF GEORGIA FOR THE WRIT OF CERTIORARI.

ALLYN M. WALLACE
Attorney at Law
Savannah, Ga.

IN THE SUPREME COURT OF GEORGIA

Atlanta

24879

EARL PRICE

v.

THE STATE.

ORDER DENYING CERTIORARI—September 24, 1968

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur.

Bill of Costs, $15.00

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA —Oct. 7, 1968

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that Allyn M. Wallace paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Henry H. Cobb, Clerk.

Case No. 43747
Court of Appeals of Georgia

Remittitur from Supreme Court

Filed in office Oct. 7, 1968)

/s/ Morgan Thomas
Clerk Court of Appeals of Georgia.

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA

43747

EARL PRICE

v.

THE STATE

ORDER STAYING REMITTITUR—September 30, 1968

It is ordered that the remittitur in this case be stayed pending application to the Supreme Court of the United States for the writ of certiorari.

* * * *

[Clerk's Certificate to Foregoing Transcript Omitted in Printing.]

* * * *

IN THE SUPREME COURT OF GEORGIA

No. 24879

Supreme Court of Georgia

No. 43,747

Court of Appeals of Georgia

EARL PRICE, APPLICANT FOR CERTIORARI.

vs.

THE STATE OF GEORGIA, RESPONDENT IN CERTIORARI.

APPLICATION FOR CERTIORARI—filed August 22, 1968

TO THE SUPREME COURT OF GEORGIA.

Now comes EARL PRICE and files this his application for a writ of certiorari in the above styled cause and for grounds thereof says:—

I.

The decision and judgment of The Court of Appeals of Georgia in the case of Earl Price, Plaintiff-in-Error, vs. The State of Georgia, Defendant-in-Error, being numbered, 43,747 in said Court, was rendered and filed on June 25th, 1968, affirming the Trial Court. The case was heard by the Third Division of said Court and its decision was unanimous.

II.

This decision and judgment was adverse to your Petitioner and Applicant, and within ten days of its rendition, Applicant, Earl Price filed his motion for rehearing in said matter, which was denied on July 24th, 1968.

III.

On July 26th, 1968, Applicant gave notice to the Clerk of The Court of Appeals of his intention to apply to The

Supreme Court of Georgia for a writ of certiorari in said cause, which notice was in writing as required by Law.

IV.

This application for said writ of certiorari is being filed with the Clerk of this Court within thirty days from the date of the final order of the Court of Appeals of Georgia on the motion for rehearing filed by Applicant in said case.

V.

Petitioner files with this application a certified copy of that portion of the record in The Court of Appeals of Georgia which Petitioner feels is necessary for a final determination of this case including a copy of the decision and judgment sought to be reviewed and corrected.

FACTUAL STATEMENT

The applicant for certiorari was indicted and tried for murder at the October, *1962* Term of the Superior Court of Effingham County, Georgia. He was found guilty and convicted of voluntary manslaughter by a Jury, the Jury fixing the sentence at 10 to 15 years.

On appeal to The Court of Appeals of Georgia, (Price vs. The State of Georgia 108 GA. App. 581) the case was reversed on an erroneous charge of the Trial Court of mutual combat.

Applicant for certiorari, Earl Price was again placed on trial for murder under the same indictment at the October, *1967* Term of The Superior Court of Effingham County, Georgia resulting in his conviction by a jury of voluntary manslaughter and a sentence of 10 years.

From the second trial for murder under the same indictment, the verdict and judgement, Earl Price appealed to The Supreme Court of Georgia. (Price vs. The State of Georgia 224 GA. 306) The case was then transferred by The Supreme Court of Georgia to The Court of Appeals of Georgia upon the theory that the only questions as to the application of plain and unambiguous provisions of the Constitution being involved, and there being no other

basis of this Court's jurisdiction of the appeal, the case must therefore be transferred to The Court of Appeals of Georgia.

ASSIGNMENT OF ERROR

Error is assigned upon the decision of The Court of Appeals of Georgia with regard to Enumerations of Error 1 and 2 complaining of the overruling of a special plea of autrefois acquit filed by Plaintiff-in-Error in The Trial Court prior to arrainment the second time and the denial of his rights under the 5th and 14th Amendments to the Constitution of The United States, in that he was placed in jeopardy of life and liberty more than once for the same offense (murder), where at the first trial in the Trial Court, the Jury found him not guilty of murder but guilty of voluntary manslaughter, The Court of Appeals of Georgia holding that when a person has been indicted for murder and convicted of voluntary manslaughter if he voluntarily seeks and obtains a new trial, he is subject to another trial generally for the offense charged in the indictment, and upon such trial he cannot successfully interpose a plea of former acquital of the crime of murder, or former jeopardy in regard thereto. The Court of Appeals of Georgia cited as authority the case of Brantley vs. The State 132 GA. 573, a decision of the Supreme Court of Georgia rendered in the year, 1910.

Said Court of Appeals of Georgia erred in not holding and ruling that the special plea of autrefois acquit filed by your Petitioner was a bar to further prosecution of the offense of murder and in not holding that your Petitioner when tried for the offense of murder the second time under the same indictment when the first jury found him guilty of voluntary manslaughter (The equivalent of finding him not guilty of murder) was a violation of his Constitutional rights under the 5th and 14th Amendments to the Constitution of The United States.

Error is also assigned on the judgement of The Court of Appeals of Georgia on the motion for rehearing holding that they were bound by the decision in the Brantley case, when in fact that case was in substance overruled by The Supreme Court of the United States. The United States

Supreme Court has repeatedly held that the 5th and 14th Amendments of the United States Constitution are applicable to State Courts, this being the Supreme Law of the land. They are also bound by the provisions of the United States Constitution.

REASONS FOR GRANTING WRIT

The decision of The Court of Appeals of Georgia involves legal principles of general, vital and state-wide importance, gravity and grave concern; that the question as to whether or not the State of Georgia is forbidden by The Constitution of The United States from prosecuting one for murder the second time when a Defendant was found guilty of voluntary manslaughter at the first trial when a Defendant successfully obtained a reversal of his former trial on an improper charge of the Trial Court. Did he waive his Constitutional defense of former jeopardy to a second prosecution for murder, simply because he elected to seek and did seek a new trial, when in fact the jury at the first trial refused and did not find him guilty of murder. Did not the jury at the first trial acquit him of murder? If it did he should not be tried the second time for murder.

These are questions that should be answered and determined because there can be dreadful consequences to those who will be confronted with similar circumstances as your Petitioner with respect to their legal rights, and then to Petitioner feels that The Supreme Court of Georgia should take a further look at the Court's decision in the Brantley case (132 GA. 573) a case decided in the year, 1910, which is apparently the Law of Georgia, old as it is, most especially in view of the recent decisions of the Federal Courts on this one point of Law and in this period of history of our Nation when Courts are now more concerned with the Constitutionally protection of human rights than they were back in the year, 1910. The Brantley case arose during what might be called a period or lull in the Courts concern of guaranteed Constitutional rights. Petitioner says that this Honorable Court should review the decision of The Court of Appeals

of Georgia in this case as well as the decision in the Brantley case and correct a situation which is not in line with The Supreme Law of the land.

Currently with the filing of this application is filed a brief of authorities relied on together with a written argument.

WHEREFORE, Applicant prays that this Honorable Court grant this application for writ of certiorari and that the judgment and decision of The Court of Appeals of Georgia be reviewed and reversed and that the errors committed by it be considered and corrected and that the rule of Law set out in the Brantley case be set aside and declared invalid.

/s/ Allyn M. Wallace
Attorney for Earl Price,
Applicant for Writ of Certiorari

IN THE SUPREME COURT OF GEORGIA

No. ———

Supreme Court of Georgia

No. 43,747

Court of Appeals of Georgia

EARL PRICE, APPLICANT FOR CERTIORARI.

vs.

THE STATE OF GEORGIA, RESPONDENT IN CERTIORARI.

CERTIFICATE OF COUNSEL

I, ALLYN M. WALLACE, counsel of record for EARL PRICE, Applicant for the Certiorari do hereby certify that I verily believe that the foregoing case is one which is contemplated by the rules of The Supreme Court of Georgia pertaining to certiorari, that it does not fall within the case of those prohibited by the rules of this Court, and I do believe that the Writ of Certiorari should be granted under the rules in said case.

This 20 day of August, 1968.

/s/ Allyn M. Wallace
Counsel of record for Earl Price,
Applicant for Certiorari

[Statement of Counsel as to Poverty of Petitioner (Omitted in Printing)]

[Certificate of Service Omitted in Printing]

[File Endorsement Omitted in Printing]

IN THE SUPREME COURT OF GEORGIA

EARL PRICE

v.

THE STATE

The following judgment was rendered September 24, 1968.

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur.

Bill of costs, $15.

[Clerk's Certificate to Foregoing Transcript Omitted in Printing.]

SUPREME COURT OF THE UNITED STATES

No. 1254 Misc., October Term, 1968

EARL PRICE, PETITIONER

v.

GEORGIA

On petition for writ of Certiorari to the Supreme Court of the State of Georgia.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 23, 1969

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1557, placed on the summary calendar and set for oral argument immediately following No. 515 Misc. In addition to the questions presented by the petition, counsel are requested to brief and argue the question of retroactivity of Benton v. Maryland, 395 U.S. —— (decided this date) and whether that decision is applicable to this case.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 358093 54

LIBRARY
SUPREME COURT, U. S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

Office-Supreme Court, U.S.
FILED
AUG 26 1969
JOHN F. DAVIS, CLERK

No. 269

EARL PRICE,

Petitioner,

vs.

GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE PETITIONER

ALLYN M. WALLACE
Attorney for Petitioner
Post Office Address
P. O. Box 8102
Savannah, Georgia 31402

INDEX

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Questions Presented	3
Statement:	
The First Trial	5
The Second Trial	5
Argument:	
I—The Provision Against Prosecution of a Defendant Twice for the Same Offense, Set Forth in the Fifth (V) Amendment Should Apply, Through the Fourteenth (XIV) Amendment, to All State Prosecutions and Should Be Binding Upon the States	8
II—Petitioner in Certiorari Was "Twice Put in Jeopardy" and His Conviction at the Second Trial Was Null and Void Under the Fifth (V) Amendment Standards	15
III—Retroactivity of *Benton* v. *Maryland* Decided by the Court, June 23rd, 1969, and Whether or Not That Decision Is Applicable to the Present Case	21
Conclusion	31

Page

TABLE OF AUTHORITIES

CASES:

Abbate v. *United States*, 359 U.S. 187, 198-199 28

Bartkus v. *Illinois*, 359 U.S. 121, 151-155, 3 L. ed. 2d 684 28

Benton v. *Maryland*, 395 U.S. —— (Decided by the Court, June 23, 1969) 4, 9, 13, 14, 15, 18, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30

Berger v. *California*, 21 L.ed. 2d 508 25

Brantley v. *State of Georgia*, 132 Ga. 573, 54 S.E. 676 ....10, 16, 19

Brantley v. *State*, 217 U.S. 284 ....10, 16, 23

Brock v. *North Carolina*, 344 U.S. 424, 426 (1953) 10, 11

Chicago B. & O. R.R. Co. v. *City of Chicago*, 166 U.S. 226 (1897) 11

Cichos v. *Indiana*, 385 U.S. 76, 17 L.ed. 2d 175 .. 16, 19

Desist v. *United States* (decided by the Court March 24, 1969), 22 L.ed. 2d 248 ....23, 24, 25

Douglas v. *California*, 372 U.S. 353 20

Downum v. *United States*, 372 U.S. 734, 736 29

Elkins v. *United States*, 364 U.S. 206, 221 (1960) 13

Gideon v. *Wainwright*, 372 U.S. 335, 343 (1962) .. 9, 11

Green v. *United States*, 355 U.S. 184, 2 L.ed. 2d 199 ....16, 17, 18, 19, 21, 29

Hoag v. *New Jersey*, 356 U.S. 464, 474-475 29

Johnson v. *New Jersey*, 16 L.ed. 2d 891 25

Katz v. *United States*, 389 U.S. 347 ....24, 25

Linkletter v. *Walker*, 381 U.S. 618, 629, 14 L.ed. 2d 601, 608 .... 24, 26

Page

Malloy v. *Hogan*, 378 U.S. 1, 10 ..... 9, 11, 12, 29
Mancusi, Warden (Wilkins, Warden) v. *George Hetenyi*, 383 U.S. 913, 15 L.ed. 667 ..... 15, 18
Mapp v. *Ohio*, 367 U.S. 643 (1961) 11
Miranda v. *Arizona*, 384 U.S. 436 20

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 11
North Carolina v. *Pearce* (decided by the Court June 23, 1969 (cite as 89 S. Ct. 2072), *Supreme Court Reporter*, West Publishing Company, Habeas Corpus 27, 28
North Carolina v. *Pearce*, decided by the Court June 23, 1969 (cite as 89 S. Ct. 2082), *Supreme Court Reporter*, West Publishing Company, Writ of Certiorari 28

Polko v. *Connecticut*, 302 U.S. 319 (1937) 10, 11
Price v. *Georgia*, 224 Ga. 306 (S.E. 2d) 6
Price v. *Georgia*, 118 Ga. App. 207, 163 S.E. 2d 916 (1963) 2, 5
Price v. *Georgia*, 118 Ga. App. 207-163 S.E. 2d 243 (1968) 2, 6, 10, 16

Robinson v. *California*, 370 U.S. 660 (1962) 11

Stovall v. *Denno*, 388 U.S. 293, 297 26

Twining v. *New Jersey*, 211 U.S. 78 ..... 10, 11, 12

United States v. *Oppenheimer*, 242 U.S. 85 13
United States v. *Ewell*, 383 U.S. 116, 124, 15 L.ed. 2d 627 28
United States v. *Wilkins*, 348 F. 2d 844, 850 11
United States of America ex rel. George Hetenyi, Relator-Appellant v. *Walter H. Wilkins, Warden of Attica Prison*, 348 Fed. Reporter 2d Series 844 ..... 14, 16, 17, 18, 19

Whitus v. *Georgia*, 385 U.S. 545 20

Page

UNITED STATES CONSTITUTIONAL PROVISIONS:

First Amendment 11
Fourth Amendment 11
Fifth Amendment 2, 4, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, 20, 22, 26, 28, 29, 30
Sixth Amendment 11, 20
Eighth Amendment 11
Fourteenth Amendment 3, 4, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 23, 24, 26, 29, 30

STATUTES:

28 U.S.C. §1257 (3) 2
28 U.S.C. §2101 (d) 2
Article XII of the Constitution of Georgia, Code Section 2-8001 ..... 15, 19

MISCELLANEOUS:

Rule Number 22 (1) of the Supreme Court of the United States 2
Supreme Court of Georgia Case #24,879 (Unreported), dated September 24th, 1968 1

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 269

EARL PRICE,

Petitioner,

vs.

GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE PETITIONER

Opinions Below

The Supreme Court of the State of Georgia denied the application for a writ of certiorari to review the judgment of The Court of Appeals of Georgia. The denial is unreported and is docketed as Case No. 24,879 and dated September 24th, 1968 (A. 53 & 61).

The decision of The Court of Appeals of Georgia which was decided June 25th, 1968 adverse to Petitioner, and also their decision on a Motion for Rehearing which was denied July 24th, 1968, to which application for certiorari

was filed in The Supreme Court of Georgia is reported as *Price* v. *The State of Georgia,* Case No. 43,747 at 118 Ga. App. 207—163 S.E. 2d 243 (1968) (A. 35-36-37-38 & 39).

The opinion of The Court of Appeals of Georgia reversing the first conviction of Petitioner is reported as *Price* v. *The State of Georgia,* Case No. 40,272 as 108 Ga. App. 581—133 S.E. 2d 916 (1963).

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U.S.C.A. 1257 (3), since the validity of State Statutes and prior State decisions on grounds of repugnancy to the Constitution of The United States and Amendments thereto are drawn in question. Certiorari was denied by The Supreme Court of Georgia on September 24th, 1968 (A. 53 & 61). The present case was docketed in The Supreme Court of The United States December 11th, 1968, as Case No. 1254—Misc., October Term 1968, now Case No. 269 October Term 1969. The time for applying for the writ of certiorari to The Supreme Court of The United States was within the period of time as required under Title 28 U.S.C.A. 2101 (d) and Rule No. 22 (1) of The Supreme Court of The United States.

Constitutional Provisions Involved

UNITED STATES CODE ANNOTATED "CONSTITUTIONAL AMENDMENTS 1 TO 5," PAGES 297 AND 318. AMENDMENT V CAPITAL CRIMES: DOUBLE JEOPARDY: SELF-INCRIMINATION: DUE PROCESS: JUST COMPENSATION FOR PROPERTY. "No per-

son shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

UNITED STATES CODE ANNOTATED "CONSTITUTIONAL AMENDMENTS 6 to 14." PAGES 288 AND 383, AMENDMENT XIV SECTION 1. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATIVES; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT ENFORCEMENT. SECTION 1—All persons born or naturalized in The United States, and subject to the jurisdiction thereof, are citizens of The United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of The United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Questions Presented for Review

The questions presented are:—

(1)—That the Courts of the State of Georgia misconstrued the statutes and decisions with reference to double jeopardy.

(2)—Does the double jeopardy provision of the Fifth (V) Amendment of The Constitution of The United States apply to State cases by and through the Fourteenth (XIV) Amendment? Are these two Amendments binding upon the States?

(3)—When a person has been indicted for murder and convicted of voluntary manslaughter, if he voluntarily seeks and obtains a new trial, is he subject to another trial for the offense of murder charged in the same indictment, and upon such a trial can he successfully interpose a plea of former acquital of the crime of murder or former jeopardy in regard thereto?

(4)—Has there been a denial of Petitioner's right by the Courts of Georgia under the Fifth (V) and Fourteenth (XIV) Amendments of The Constitution of The United States?

(5)—In addition to the questions presented above by Petitioner in Certiorari and in the petition for a writ of certiorari, The Supreme Court of The United States in granting certiorari on June 23rd, 1969, requested that counsel for Petitioner in certiorari brief and argue the question of retroactivity of the case of *Benton* v. *Maryland,* 395 U.S. ——— (decided by the Court June 23rd, 1969) and whether that decision is applicable to the case now before the Court.

Statement of Case

The First Trial

At the October, 1962 Term of The Superior Court of Effingham County, Georgia, Petitioner in certiorari was indicted by a Grand Jury for the offense of murder (A. 8-9 & 28-29). On October 17th, 1962, Petitioner in certiorari was tried for murder under the indictment before a trial jury and the jury returned a verdict of guilty of voluntary manslaughter the sentence being fixed by the trial Jury from 10 to 15 years in the penitentiary (A. 10 & 30).

Petitioner in certiorari voluntarily appealed to the Court of Appeals of Georgia Case No. 40,272, *Price* v. *State of Georgia,* 108 Ga. App. 581, 133 S.E. 2d 916 (1963). The case was reversed on an erroneous charge by the trial Judge to the petit Jury (A. 21).

The Second Trial

On October 20th, 1967, Petitioner in certiorari was again placed on trial for murder under the same indictment obtained at the October 1962 Term of The Superior Court of Effingham County, Georgia and for the same alleged offense of murder for which he had been tried at the October, 1962 Term of The Superior Cou t of Effingham County, Georgia, before a petit Jury and the Jury again found Petitioner in certiorari guilty of voluntary manslaughter (A. 11). The Sentence fixed by the Jury at the second trial was 10 years (A. 11).

Prior to the second trial, counsel for Petitioner in certiorari filed in The Superior Court of Effingham County,

Georgia, a plea of Autrefois Acquit, pleading that to again try Petitioner in certiorari for murder under the same indictment for the same alleged offense of murder would be double jeopardy in view of his conviction at the first trial, of voluntary manslaughter (A. 5-6-7). Argument was had in the Court on the Pleas and Motion (A. 13 thru 27) October 19th, 1967, the day prior to the actual trial of the second case, and the Plea and Motion were denied by the trial Judge (A. 11). During the second trial and in the Court's charge to the petit Jury, the trial Judge gave the Jury the definition of murder under Georgia Law (A. 31).

From the second trial and conviction of Manslaughter, Petitioner in certiorari appealed to The Supreme Court of Georgia (A. 32-33). The case was transferred to the Court of Appeals of Georgia since "only questions as to the application of plain and unambiguous provisions of the Constitution" were involved. *Price* v. *State,* 224 Ga. 306.

The second case having been transferred to the Court of Appeals of Georgia, from the Supreme Court of Georgia, on the appeal, the Court of Appeals of Georgia, *Price* v. *State of Georgia,* 118 Ga. App. 207, 163 S. E. 2d 243 (1968) the Court affirmed the lower or trial Court (A. 35-36) on all eight Enumeration of Errors (A. 32-33) filed with the appeal, two of which are now before this Honorable Court for determination and set out in this brief. The Judgment of the Court of Appeals of Georgia is a part of the record (A. 39). On motion for a rehearing in the Court of Appeals of Georgia (A. 40 thru 49) the Court on July 24th, 1968 rewrote their first opinion at which time the motion for a rehearing in the Court of Appeals of Georgia was denied (A. 37-38 & 39). Subsequent to the denial of the motion

for a rehearing, notice of intention to certiorari to The Supreme Court of Georgia (A. 51-52) was filed with the Court of Appeals of Georgia and the Supreme Court of Georgia denied certiorari on September 24th, 1968 (A. 53).

Notice of intention to apply to The Supreme Court of The United States for a writ of certiorari was filed with The Court of Appeals of Georgia within the time allowed by law (A. 1-2 & 3). A petition for a writ of certiorari to The Supreme Court of The United States was filed in this Honorable Court together with a motion for leave to file certiorari in forma pauperis and the case was docketed December 11th, 1968 as No. 1254 Misc., October Term 1968. On June 23rd, 1969, The Supreme Court of The United States granted the motion for leave to proceed in forma pauperis and the petition for a writ of certiorari and the case is now before this Honorable Court for determination and is now known as *Earl Price* v. *Georgia*, No. 269, O.T. 1969.

ARGUMENT

I.

The Provision Against Prosecution of a Defendant Twice for the Same Offense, Set Forth in the Fifth Amendment Should Apply, Through the Fourteenth Amendment, to All State Prosecutions, and Should Be Binding Upon the States.

There is set out in this brief and the petition for a writ of habeas corpus to The Supreme Court of Georgia, filed in this Honorable Court four questions for review by the Court. There is, however, only two issues present in this case and in the questions listed for review. The first issue in this case, is whether or not the Double Jeopardy provision of the Fifth Amendment to the Constitution of The United States is applicable to state prosecutions by and through the Fourteenth Amendment. The other issue is that if the Fifth Amendment's provision against Double Jeopardy is applicable and binding upon the states, then was Petitioner in certiorari twice put in jeopardy when he was tried for murder the second time under the same indictment when he was convicted of voluntary manslaughter at the first trial, the first trial and conviction having been reversed by The Court of Appeals of Georgia.

The Fifth Amendment prohibition against Double Jeopardy is a part of The Bill of Rights and is among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment. Due Process of Law is secured against invasion by the Federal Government by The Fifth Amendment and is safeguarded

against state action in identical words of The Fourteenth Amendment. In the case of *Gideon* v. *Wainwright*, 372 U.S. 335, 343 the Court concluded that certain, fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process clause of the Fourteenth Amendment. Certainly if a part of the Fifth Amendment, such as "private property shall not be taken for public use without just compensation" and "one not being compelled in any criminal case to be a witness against himself" which have by this Honorable Court been declared to be fundamental personal rights, then certainly that portion of The Fifth Amendment with regard to Double Jeopardy should be declared as a fundamental personal right and liberty to be protected by the Due Process Clause of The Fourteenth Amendment. In the case of *Malloy* v. *Hogan*, 378 U.S. 1, 10 (1964) the Court said "If the Fifth Amendment's prohibition against Double Jeopardy applies to state prosecutions, then the Federal Standard for enforcement of this protection must be complied with."

In the case of *Benton* v. *Maryland*, 395 U.S. —— (not yet reported) decided by this Honorable Court on June 23rd, 1969, held that on the merits of the case that the Double Jeopardy Clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment. The Double Jeopardy clause has now been declared by this recent decision to be a fundamental personal right to be protected by the due process clause of the Fourteenth Amendment. In citing the *Benton* case counsel for Petitioner in certiorari is aware of the fact that the Court has requested Petitioner in certiorari to brief and argue the question of retroactivity of the *Benton* case and whether

or not the *Benton* decision is applicable to the case now before the Court. This will be undertaken in this Brief later on. To use the language of the Court, the Court said "We today find that the Double Jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our Constitutional heritage, and that it should apply to the states through the Fourteenth Amendment."

The position of the State of Georgia is that "When a person has been indicted for murder and convicted of voluntary manslaughter, if he voluntarily seeks and obtains a new trial, he is subject to another trial *generally* for the offense of murder charged in the indictment and that upon such trial he cannot successfully interpose a plea of former acquittal of the crime of murder or former jeopardy in regard thereto." Cited by the State of Georgia is the case of *Brantley* v. *State of Georgia,* 132 Ga. 573 (64 S.E. 676) affirmed in *Brantley* v. *State of Georgia,* 217 U.S. 284 (1910). See *Price* v. *State of Georgia,* 118 Ga. App. 207—163 S.E. 2d 243 (1968).

The State of Georgia further contends in their Brief in opposition to Petitioner's petition for a writ of certiorari as requested of the State by this Honorable Court that in addition to the *Brantley* case, that the Double Jeopardy under the Fifth Amendment to the Constitution applies only to Federal Jurisdiction and they cite as authority the case of *Polko* v. *Connecticut,* 302 U. S. 319; *Twining* v. *New Jersey,* 211 U.S. 78 and *Brock* v. *North Carolina,* 344 U.S. 424, 426 (1953). What the State of Georgia has overlooked is that the *Brantley* case was decided in the year 1910 when the Courts of our great nation were not as much concerned as they are now in the year 1969 about the con-

stitutional rights of the citizens of this Country. This is a new day. The *Polko* case doctrine has been rejected by the recent decisions of this Court, in fact not only the *Polko* case but also the *Twining* case and the *Brock* case have all been cut away.

The *Polko* decision and reasoning should not be followed because the Double Jeopardy guaranty is in fact as much a fundamental principle of liberty and justice as other provisions of the Bill of Rights which have been made applicable to the states through the Fourteenth Amendment. Since the *Polko* case other amendments of the Constitution have been made applicable to the states, all a part of the Bill of Rights, through the Fourteenth Amendment. For example, the First Amendment (Freedom of the Press), *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); The Fourth Amendment (unreasonable searches and seizures by state government) *Mapp* v. *Ohio*, 367 U.S. 643 (1961); The Fifth Amendment (Protection against deprivation of property without just compensation) *Chicago B & O R.R. Co.* v. *City of Chicago*, 166 U.S. 226 (1897); Fifth Amendment (Protection against self-incrimination) *Malloy* v. *Hogan*, 378 U.S. 1; Sixth Amendment (right to assistance of counsel in criminal cases) *Gideon* v. *Wainwright*, 372 U.S. 335 (1962); Eighth Amendment (protection against cruel and unusual punishment) *Robinson* v. *California*, 370 U.S. 660 (1962).

The history of the "Double Jeopardy" protection indicates that it is a "fundamental principle of liberty and justice which lies at the base of all our civil and political institutions. In the case of *United States* v. *Wilkins*, 348 F 2d 844, 850 the Court said "Abhorrence to successive re-

prosecutions is deeply rooted in our common law traditions, and the Bill of Rights curb on the power of the Federal Government to reprosecute is ample recognition of how central this abhorrence is to our constitutional concept of justice."

The Fourteenth Amendment says to the states with reference to the Bill of Rights that if you violate these rights, the state has exceeded the limit of your power and your doing is wrong and is void. The purpose and the intent of the Congress in the passage of the Fourteenth Amendment were to give Congress the power to enforce the Bill of Rights against state deprivation of those rights since, up to the time of the Fourteenth Amendment there was no power to enforce the Bill of Rights in the states. The fact remains that in the present case, the State of Georgia did not comply with the Double Jeopardy provision of the Fifth Amendment rather chose to apply a ruling of The Supreme Court of Georgia made or held in the year 1910. In recent years this Court has overruled many of the old decisions on the Bill of Rights. The *Malloy* case in fact undermined the *Twining* case decision against self-incrimination as set out in the Fifth Amendment thus prohibiting the state from infringement on the privilege of a fundamental right. This being true, then why not make the Double Jeopardy provision of the Fifth Amendment as meaningful as the Court has done in recent years to other provisions of the Fifth Amendment? There are many other rulings and decisions of this Honorable Court, too many to mention here, that have protected the fundamental rights and liberties of the citizens of this country that heretofore several states have ignored. The Bill of Rights was written and adopted and so was the Fourteenth Amendment

and they were for the protection of the citizens living in this country.

The Court has now said in the *Benton* case, decided June 23rd, 1969, that the Double Jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage and that it should apply to all of the states through the Fourteenth Amendment. If this new doctrine or ruling of the Court applies to John Dalmer Benton, who apparently was subjected to double jeopardy prior to the ruling in his (the *Benton* case) case, then why would it not apply in the case now before the Court, if the Petitioner in certiorari was so subjected in the Georgia Courts. It might here for the moment be said that the ruling in the *Benton* case was in fact itself as to its application, retroactively applied, because Benton was placed in double jeopardy prior to this decision.

It has been said by the Court in the case of *Elkins* v. *United States,* 364 U.S. 206 at 221 in the year 1960, that "The very essence of a healthy Federalism depends upon the avoidance of needless conflict between the State and Federal Courts." The mere outlawing of a dual and conflicting system should, as stated in the *Elkins* case, be brought to a speedy conclusion. It is apparent that the advantage of such incorporation far outweigh the disadvantages.

The doctrine of "res judicata" in civil cases appears to be a counterpart to double jeopardy. It was stated in the case of *United States* v. *Oppenheimer,* 242 U.S. 85, that an adjudication should be considered final and binding between the same parties on the same question, as a fundamental principle of justice. This case further stated that

the principle of res judicata is a "fundamental principle of Justice" and therefore applies to state criminal proceedings through the Fourteenth Amendment due process of law clause.

Since the passage of the Fourteenth Amendment was to give Congress the power to enforce the Bill of Rights upon the states and the entire Fifth Amendment is a part of The Bill of Rights, then why not now apply the intent and purpose of the Fourteenth Amendment and force the states to abide by the Bill of Rights in its entirety? If it was the law in that day and the day of John Dalmer Benton (the *Benton* case), then certainly it is the law today and has been prior to the turn of the century.

It is submitted that for the reasons herein set out the "Double Jeopardy" protection of the Fifth Amendment by and through the Fourteenth Amendment should be applied to the case now before the Court, provided Petitioner in Certiorari was twice tried for murder under the same indictment for the same offense, as will be shown in Part II of this Brief.

In conclusion of Part I of this Brief, Petitioner in Certiorari calls the Court's attention to the case of *United States of America ex rel. George Hetenyi, Relator-Appellant* v. *Walter H. Wilkins, Warden of Attica Prison,* 348 Fed. Reporter 2d Series 844, where the Second Circuit Court of Appeals in a *New York State case* held that "Guarantee against double jeopardy is a fundamental right within the doctrine of selective incorporation of The Bill of Rights, those that are fundamental, are absorbed by due process clause of the Fourteenth Amendment and are thus made applicable to the states." This case was reversed by the

Circuit Court of Appeals of the Second Circuit and held that the Double Jeopardy of The Fifth Amendment was applicable to State Courts through the Fourteenth Amendment. This case on certiorari went to this Honorable Court from the Second Circuit Court of Appeals, *Mancusi, Warden (Wilkins, Warden)* v. *George Hetenyi,* 383 U.S. 913, 15 L ed 667. The Writ of Certiorari was denied by this Honorable Court. As stated this case is a state case out of the State of New York. Certainly the State of Georgia is bound by this ruling of The Circuit Court of Appeals under Article XII of The Georgia State Constitution, Code Section 2-8001—The Supreme Law, the Laws of The United States in pursuance thereof.

It is felt that the Court should apply the ruling in the *Benton* case decided June 23rd, 1969, to the present case now before the Court.

II.

Petitioner in Certiorari Was "Twice Put in Jeopardy" and His Conviction at the Second Trial Was Null and Void Under the Fifth Amendment Standards.

Petitioner's plea of Autrefois Acquit or Plea of Former Jeopardy, as was said in the *Benton* case "was grounded on the universal maxim of the common law of England that no man is to be brought into jeopardy of his life more than once for the same offense." The question now is "Was Petitioner in Certiorari twice put in Jeopardy when he voluntarily sought and did get a reversal of his first conviction of Voluntary Manslaughter the results of being tried for murder, when he was again tried for murder,

the second time, when he was again convicted of Voluntary Manslaughter under the same indictment and for the same alleged offense of murder and the same trial Court."

The State of Georgia relies upon the case, *Brantley* v. *The State of Georgia,* 132 Ga. 573 which was in fact affirmed by this Court in 217 U.S. 284, 54 L ed 768 (1910), contending that the mere fact that Petitioner in Certiorari voluntarily sought and obtained in the Court of Appeals of Georgia a reversal of his first trial on an error in the charge to the Jury, that he was by this act, subject to being again tried for murder even though he was convicted of Voluntary Manslaughter at the first trial. See *Price* v. *Georgia,* 118 Ga. App. 207 S.E. 2d 243 (1968).

In the case of *Cichos* v. *Indiana,* 385 U.S. 76, 17 L ed 2d 175, Mr. Justice Fortas with whom The Chief Justice and Mr. Justice Douglas joined, in a separate opinion stated that to try one for murder the second time after his conviction of second degree (voluntary manslaughter) he was exposed to the hazards of prosecution and conviction for the more onerous crime, and second it gave the prosecution the advantage of offering the Jury a choice—a situation which is apt to induce a doubtful Jury to find the Defendant guilty of the less serious offense rather than to continue debate as to his innocence. This doctrine was also stated in the *Hetenyi* v. *Wilkes,* 348 F 2d 844 (a New York State case) in the Second Circuit Court of Appeals.

In the case of *Green* v. *United States,* 355 U.S. 184, 2 L ed 2d 199 Defendant Green was not acquitted of first degree murder charge at the first trial. Just as in the present case before the Court, the Jury did not return a verdict on that Count, but convicted Green on the lesser charges

of arson and second degree murder. The Court held that Green could not be retried on the first degree murder charge. The Court clearly and unmistakably held that whether Green was acquitted of the greater offense (murder) was of no consequence. He had been exposed to jeopardy. So it is in the present case before the Court. It is of no consequence whether the silence of the Jury on the murder charge amounted to acquittal. Petitioner was put in jeopardy on the murder charge and he cannot again be tried on that charge (murder). In fact the *Green* case held that Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gauntlet once on that charge and the Jury refused to convict Green of murder (First Degree). It was further said in the *Green* case that Green's jeopardy for First Degree murder came to an end when the Jury was discharged so that he could not be retried for that offense. The Court further said in the *Green* case that the Court was of the opinion that the case can be treated no differently, for purposes of Former Jeopardy, than if the Jury had returned a verdict which expressly read: "We find the Defendant not guilty of murder in the first degree but guilty of murder in the second degree." The language stated above is that expressed by the Court in the *Green* case. This is exactly the position of Petitioner in the case now before the Court. Petitioner in Certiorari was tried for murder and convicted of voluntary manslaughter. The verdict of the Jury which stated that "We the Jury find the Defendant guilty of voluntary manslaughter and fix his sentence at from 10 to 15 years" (A. 10), was equivalent to or the same as if the Jury returned a verdict to read "We the Jury find the Defendant not guilty of mur-

der but guilty of manslaughter." The case of *United States ex rel. Hetenyi* v. *Wilkins*, 348 Fed. 2d 844, Second Circuit Court of Appeals (1965), certiorari denied by this Honorable Court, 383 U.S. 913, 15 L ed 2d 667, took the same position as outlined in the *Green* case and in fact the opinion as written by the Court made specific reference to the *Green* case. Now this Honorable Court has said in the *Benton* case decided June 23rd, 1969, that the Double Jeopardy Clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment. This Petitioner in Certiorari says is the law in his case now before the Court. Petitioner objected and filed his plea of Autrefois Acquit, a plea of former jeopardy and it was denied in the trial Court and Petitioner was again tried for murder. This is a violation of Petitioner's rights under the Fifth Amendment and on the decisions above in the *Green* case and the *Hetenyi* case, the present case now before the Court should be reversed. In the *Green* case the Government contended, that Green waived his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a successful appeal of his improper conviction of second degree murder. This is exactly the position of the State of Georgia in the present case now before the Court. The Court further said in the *Green* case that they could not accept this paradoxical contention. Now the *Benton* case has settled the question once and for all. One cannot be put in jeopardy twice for the same offense in State Courts. It is clear in view of the *Green* case and the *Hetenyi* case that this was the law of the land as far back as the birth of the Fourteenth Amendment before the turn of the century and should be applied in the present case. Mr. Justice Fortas along with the Chief Justice and Mr. Justice

Douglas in the *Cichos* case well stated the law as they saw it with reference to Double Jeopardy in 1966. The *Green* case and the *Hetenyi* case did in effect repeal the *Brantley* case upon which the State of Georgia rests its case.

Article XII Laws of General Operation of Force in The State Constitution of The State of Georgia, Section 1, Laws of Force (Code Section 2-8001) reads as follows:—Paragraph I, Supreme Law—The Laws of General Operation in this state are, first:—As the Supreme Law:—The Constitution of The United States, the Laws of the United States in pursuance thereof and all treaties made under the authority of The United States.

The State of Georgia by the Section of The Georgia Constitution above quoted is bound by the decisions of the *Green* case and the *Hetenyi* case, the latter being a Circuit Court of Appeals decision. Both of these cases are Laws of The United States in pursuance thereof to the Federal Constitution.

The Fourteenth Amendment forbids the states to deprive persons of life, liberty and property without due process of law, and that no state shall abridge the privileges or immunities of citizens of the United States. While there has never been a majority of the members or Judges of The Supreme Court of The United States willing to subscribe to the view that the Fourteenth Amendment requires a blanket application of the entire Bill of Rights to the states, the Fifth Amendment, all of it, being one of the Bill of Rights, but leaves to posterity the determination of just what the Amendment protects, the fact yet remains that The Supreme Court of The United States in many cases has almost without exception taken the

position that the Fifth Amendment is applicable to state cases by and through the Fourteenth Amendment where other and certain provisions of the Fifth Amendment were in issue. This is also true of other portions of The Bill of Rights where certain issues of The Bill of Rights were in question with regard to state application. This being true, then why would not this same trend of the Court be applied in the present case? It was applied in the *Benton* case.

It is urged by Petitioner in Certiorari that this Honorable Court grant to him the same relief as was given to Benton in his case and under the same prior decisions of this Court as pointed out in this case and the *Benton* case. If the Bill of Rights, the Fifth Amendment, applied in the *Benton* case certainly under the facts and the law, the facts, being almost identical in each case, should be applied to the present case now before the Court.

There are many other cases that might be called to the attention of the Court where the Court almost without exception, has taken the position that the Bill of Rights apply to the states. This has been done by a cumulative process instead of the en bloc approach. To mention other cases not up to now herein mentioned, might Petitioner in certiorari mention them now. The case *Douglas* v. *California,* 372 U.S. 353, on the Sixth Amendment; *Miranda* v. *Arizona,* 384 U.S. 436, on a portion of The Fifth Amendment, "self-incrimination"; and the case of *Whitus* v. *Georgia,* 385 U.S. 545, on discrimination with regard to selection of Grand and Petit Juries.

As stated the *Benton* case has now made the "Double Jeopardy" section of the Fifth Amendment applicable to

the states. It should be applied accordingly in the present case now before the Court and it is so urged by Petitioner in Certiorari. The *Green* case decided December 16th, 1957, covers in full the facts in the present case and stated what the law was, prior to Petitioner's indictment in the lower and trial Court. The Court in the *Green* case said "Once a person has been acquitted of an offense, he cannot be prosecuted again on the same charge."

III.

Retroactivity of Benton v. Maryland Decided by the Court June 23rd, 1969, and Whether or Not That Decision Is Applicable to the Present Case.

Petitioner in Certiorari in argument on the retroactivity of the *Benton* case and its applicability to the present case now before the Court respectfully takes the position that the *Benton* case is not a new law or rule, in that the Court in the *Benton* case merely stated what the law was and how it should be applied by the states. The doctrine or decision stated by the Court in the *Benton* case has been the law ever since the birth of the Bill of Rights, and the Fourteenth Amendment. The states, which includes the State of Georgia, have failed to apply the law, the Bill of Rights in every instance where possible where prosecutions of this kind are concerned. It appears that it takes the might and power of The Supreme Court of the United States to see and demand the states to recognize these fundamental rights safeguarded by the Bill of Rights and the Fourteenth Amendment. In all fairness and in the name of justice, it is respectfully submitted that in the instant case, the court need not and should not concern itself with

the question of retroactivity of the *Benton* case because the law as stated and set out in the *Benton* case has been the law and was at the time Petitioner in certiorari was subjected to Double Jeopardy. When the Fourteenth Amendment ratification was announced in the Congress, it then put in operation the tool with which to enforce the Bill of Rights upon the states. The Bill of Rights said what it meant and so did the Fourteenth Amendment. Petitioner in Certiorari cannot too strongly insist and say that the law, the violation of the law, the Bill of Rights, the Fifth Amendment and the Fourteenth Amendment, of which he complains, was the Supreme Law of the land long prior to the time of his first trial for murder in October, 1962. For this reason Petitioner in Certiorari went to great length and into detail in his argument in this brief in argument of the two questions presented and now before this Court on the two Amendments, the Fifth and the Fourteenth and their application to his case and the violation of his constitutional rights. If the Fifth Amendment and the Fourteenth Amendment were applicable and the law in the *Benton* case, then why should they not be the law in Petitioner's case now for determination in this Court? There must be a first in every undertaking of man and the *Benton* case appears to be the first time a majority of the Justices of The Supreme Court has ruled on the applicability of the Fifth Amendment. This Court has merely said in the *Benton* case to the State of Maryland, that your doing is wrong and unlawful; you exceeded the limit of your power and we, this Court, now instruct you, Maryland, to comply with the Bill of Rights and the Supreme Law of the land.

So it is in the present case before the Court. The State of Georgia should likewise be told by this Court that you have exceeded the limit of your power and that you are wrong in your doing and in taking the position that just because Petitioner in Certiorari voluntarily sought and did obtain a new trial upon an illegal conviction the first time, he had waived his right to plead Double Jeopardy, relying on a 1910 decision of The Supreme Court of Georgia, the *Brantley* case. This is a new day and it would appear that it would be quite unfair to deny Petitioner in Certiorari the protection of the Bill of Rights and the benefit of the Fourteenth Amendment when it was the law at the time and when Benton was given and granted relief. Respectfully, it is felt that this Court in the *Benton* case has not established or announced a new law by its decision in the *Benton* case. It is merely a directive to the State of Maryland and all of the other states. "Comply with the law, the Bill of Rights and the Fourteenth Amendment, Maryland, Georgia, and all others." "It has been the law all the time, now apply it."

As was said by Mr. Justice Harlan in the case of *Desist v. United States* decided by this Court March 24th, 1969, as appearing in the advance sheet as 22 L ed 2d 248, 263 "First it is necessary to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law."

It would be unfair and certainly discriminatory to give new trials for unconstitutional convictions when others are

kept in prison without any hope whatsoever of relief or release though their complaint is equally meritorious. "The Federal Constitution neither prohibits nor requires retrospective effect for decisions expounding new constitutional rules affecting criminal trials,"—Headnote seven (7) of the *Desist* case. The Court in the case of *Linkletter* v. *Walker*, 381 U.S. 618, 629, 14 L ed 2d 601, 608 established, as stated in this Brief, "the Constitution neither prohibits nor requires retrospective effect" for decisions expounding new constitutional rules affecting criminal trials.

As was stated by Mr. Justice Douglas in the dissenting opinion in the *Desist* case, it was a mystery to him why *Katz* v. *United States*, 389 U.S. 347 which was given retroactive effect to petitioner Katz will not be given retroactive effect to Petitioner Desist. Mr. Justice Douglas further stated "that does not seem to me to be the administration of justice with an even hand, that he would have understood the ruling in the *Desist* case had the Court announced a new constitutional search and seizure rule to be applied prospectively in all cases."

To say that the decision in the *Benton* case is not to be retroactively applied in the present case it would appear that the Court would be denying Petitioner the benefit of a fundamental Constitutional guarantee which was granted Benton. The *Benton* case has simply applied a well established constitutional principle that has been the law since the adoption of the Bill of Rights and the Fourteenth Amendment long before the turn of the century. Mr. Justice Fortas in the *Desist* case said—"In my judgment the Court's holding is of pervasive importance because it adds new and unhappy dimensions to the non-retroactivity

doctrine. The Court not only denies the benefit of a fundamental constitutional provision, and not merely of Court-made rules implementing a constitutional mandate or of a statutory principle to a class of persons because of the chance operation of the judicial calendar; it does so in the face of the fact that the ruling at issue is neither novel nor unanticipated." Mr. Justice Fortas further pointed out in his dissent in the *Benton* case that the Court has insisted that all persons, not those just selected by the chance of the calendar, receive the benefit of newly-declared constitutional commands that are central to the reliability of the fact-finding process at trial and without which innocent persons may have been adjudged guilty. He cites numerous decisions of this Court to sustain his allegation too numerous to mention in this brief appearing on page 269 of the *Desist* case reported in 22 L ed 2d 248.

Mr. Justice Harlan in the *Benton* case dissenting in the Court's decision stated that "Again, although it has been said that a decision will be retroactively applied when it has been clearly foreshadowed in our prior case law" quoting *Johnson* v. *New Jersey, supra* at 731, 16 L ed 2d at 891; *Berger* v. *California,* 21 L ed 2d 508 "the Court today (*Desist* case) rejects such a contention." He further said that, "Indeed, the Court now also departs from pre-existing doctrine in refusing retroactive application within the Federal system of the new rule ultimately laid down in *Katz* v. *United States,* 389 U.S. 347, despite its concession that relatively few federal cases would have to be reconsidered."

Petitioner in certiorari understands the Court's language in the *Desist* case in commenting on the rule set out

in the *Linkletter* case establishing that the Constitution neither prohibits nor requires retrospective effect for decisions expounding new constitutional rules affecting criminal trials, the Court having viewed the retroactivity or non-retroactivity of such decisions as a function of three considerations which were recently summarized in *Stovall* v. *Denno,* 388 U.S. 293, 297. The three considerations or the criteria guiding resolution of the question implicate (a)—the purpose to be served by the new standard; (b)—the extent of the reliance by law enforcement authorities on the old standards; and, (c)—the effect on the administration of justice of a retroactive application of the new standards. The question is whether or not the *Benton* case with regard to retroactivity stated a new constitutional rule or did the decision merely state what the law in such cases was, which Petitioner says was the law since the adoption of the Fourteenth Amendment, or was it a directive to the State of Maryland to comply or apply the law. Petitioner in Certiorari feels that the *Benton* case was an announcement by the Court as to what the law in the case was, something that the majority of the Court had not before had the opportunity, or did not elect, to rule on in regard to the Double Jeopardy clause of the Fifth Amendment. Has this decision not been the law since the adoption of the Fourteenth Amendment? It would appear that if the Court takes the position in the present case that the ruling of the Court in the *Benton* case is not retroactive then the Court would be departing from pre-existing doctrine in refusing retroactive application within the federal system of the new rule ultimately laid down in the *Katz* case. Certainly if the Fifth and Fourteenth Amendments were violated or denied Benton, which this Court

says they were then by the same token or rule why would not they apply to Petitioner in the present case? It would be most unfair and certainly against this Court's position in prior cases before the Court where one's fundamental personal rights and liberties were involved. The *Benton* case rule is not new. It merely applied a well established constitutional principle closely analogous to those which have been previously considered in prior case law. For example and to state it more broadly, in every case, if not without exception, this Court has taken the position where one's constitutional rights were violated in the State Courts, as they came to this Court for review, this Court has said the Bill of Rights apply to state prosecutions. The present case before the Court is just such a case.

In the case of *North Carolina* v. *Pearce* decided by this Court June 23rd, 1969 (cite as 89 S. Ct. 2072 (1969) Supreme Court Reporter, West Publishing Company), Mr. Justice Stewart speaking for the Court said:—"The Court has today in *Benton* v. *Maryland*, 395 U.S. ——, 22 L Ed 2d —— said that the Fifth Amendment guarantee against double jeopardy is enforceable against the states through the Fourteenth Amendment. That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. And it protects against multiple punishment for the same offense." Mr. Justice Stewart further said that "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And there has never been any doubt of (this rule's) entire complete protection of the party when a second punishment is proposed in the same Court, on the same facts, for the same statu-

tory offense, that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense *as from being tried twice for it.*"

Mr. Justice Black in the North Carolina case above quoted stated on page 2082 that "Due process, moreover, is a guarantee that a man should only be tried and convicted in accordance with valid laws of the land. If a conviction is not valid under these laws, statutory and constitutional, a man has been denied due process and has a constitutional right to have the conviction set aside, without being deprived of life, liberty or property as a result."

In the case of *United States* v. *Ewell,* 383 U.S. 116, 124, 15 L. Ed. 2d 627, the Court said, "It was established, at an early date that the Fifth Amendment was designed to prevent an accused from running the risk of 'Double Jeopardy.'"

In the case of *North Carolina* v. *Pearce* decided June 23rd, 1969 (cite as 89 S. Ct. 2089 (1969), Supreme Court Reporter, West Publishing Company), on Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, Mr. Justice Douglas speaking for the Court said, "The ban on Double Jeopardy has its roots deep in the history of occidental jurisprudence." "Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in Western civilization." *Bartkus* v. *Illinois,* 359 U.S. 121, 151-155, 3 L. Ed. 2d 684. And its purposes are several. It prevents the state from using its criminal processes as an instrument of harassment to wear the accused out by a multitude of cases with accumulated trial." *Abbate* v. *United States,* 359 U.S. 187, 198-199. It was further said in this case

that "It serves the additional purpose of precluding the state following acquittal, from successively retrying the defendant in the hope of securing a conviction." "The vice of this procedure lies in relitigating the same issue on the same evidence before two different juries, with a man's innocence or guilt at stake in the hope that they would come to a different conclusion." *Hoag* v. *New Jersey*, 356 U.S. 464, 474-475. "Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches." *Downum* v. *United States*, 372 U.S. 734, 736.

As in the *Green* case, Petitioner in the case now before the Court did not waive his constitutional defense of former jeopardy to a second prosecution simply because he voluntarily sought and obtained a reversal of a former illegal trial.

The argument here made by Petitioner in Certiorari with regard to the application of the Fifth and Fourteenth Amendments to the case now before the Court and the decisions quoted would appear to Petitioner to be irresistible to say nothing about the *Benton* case being retroactive.

In conclusion it is felt that for the reasons advanced in this Brief, that the Court should hold in the present case, as it did in the *Benton* case that the "Double Jeopardy" protection of the Fifth Amendment through the Fourteenth Amendment is applicable in this case. As was said in the case of *Malloy* v. *Hogan*, 378 U.S. 1, 10 (1963), "If the Fifth Amendment's prohibition against 'Double Jeop-

ardy' applies to state prosecutions, then the federal standard of enforcement of this protection must be complied with by the states." The "Double Jeopardy" prohibition is not against being twice punished, but against being twice put in jeopardy. It is submitted that the State of Georgia in the present case violated the federal standard for protection of Petitioner's right to be free from "Double Jeopardy".

Had Petitioner in Certiorari been tried the second time for a lesser offense rather than murder (Voluntary Manslaughter), it is felt that the Jury would have possibly given more serious consideration, and certainly continue debate as to Petitioner's innocence. By trying Petitioner the second time for murder, it gave the prosecution, the state, an unfair advantage of offering the Jury a choice—a situation that was apt to induce a doubtful Jury to find Petitioner guilty of a lesser offense rather than find him not guilty or acquitted or to even continue their deliberations or debate as to his innocence.

It is respectfully submitted that the rationale and reasoning in the case of *Benton* v. *Maryland* is equally applicable to the case presently before the Court. The Fifth and Fourteenth Amendments were held to be the law by this Honorable Court in the *Benton* case. Why would these two Amendments not be the law in the present case?

Conclusion

For the foregoing reasons, Petitioner in Certiorari submits that his conviction for Voluntary Manslaughter on October 20th, 1967, affirmed by the Appellate Courts of Georgia should be reversed.

Fiat Justitia Ruat Coelum.

Respectfully submitted,

ALLYN M. WALLACE
Attorney for Petitioner in Certiorari

ALLYN M. WALLACE
Attorney at Law
P. O. Box 8102
Savannah, Georgia 31402

INDEX

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

ARGUMENT

The double jeopardy clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment 2

The holding in *Benton v. Maryland*, 395 U.S. 784 (1969), appears to make applicable to the facts in the instant case certain other United States Supreme Court cases decided prior and subsequent to *Benton v. Maryland, supra* 3

Considering the purpose to be served by the new standard set out in *Benton v. Maryland*, 395 U.S. 784 (1969), and the extent of the reliance by prosecuting authorities on the old standard, and the effect on the administration of justice of the retrospective application of the new standard, *Benton v. Maryland, supra*, should not be made to apply retrospectively to cases tried before June 23, 1969 ..... 5, 6

CONCLUSION 12

CITATIONS

Page

Cases

Baldonado v. California, 366 U.S. 417 (1961) 5

Bartkus v. Illinois, 359 U.S. 121 (1959) 7

Benton v. Maryland, 395 U.S. 784 (1969) 3, 5, 6, 8, 9, 11, 12, 13

Brantley v. State, 132 Ga. 573, 64 S.E. 676 (1909), *aff'd.* 217 U.S. 284 (1910) 7, 8

Brock v. North Carolina, 344 U.S. 424 (1953) 7

Chapman v. California, 386 U.S. 18 (1967) 5

Cichos v. Indiana, 385 U.S. 76 (1966) 3, 7

Desist v. United States, 394 U.S. 244 (1969) 11, 12

Escobedo v. Illinois, 378 U.S. 478 (1964) 10, 11

Gideon v. Wainwright, 372 U.S. 335 (1963) 9, 10

Green v. United States, 355 U.S. 184 (1957) 3, 4, 5, 8, 9

Griffin v. California, 380 U.S. 609 (1965) 7, 8

Griffin v. Illinois, 351 U.S. 12 (1956) 9

Hetenyi v. Wilkins, 348 F.2d 844 (2nd Cir. 1965) 4

Hoag v. New Jersey, 356 U.S. 464 (1958) 7, 8

Jackson v. Denno, 378 U.S. 368 (1964) 9, 10

Johnson v. New Jersey, 384 U.S. 719 (1966) 10, 11, 12

Katz v. United States, 389 U.S. 347 (1967) 11, 12

CITATIONS—continued

	Page
Linkletter v. Walker, 381 U.S. 618 (1965)	6, 7, 9, 11, 12
Miranda v. Arizona, 384 U.S. 436 (1966)	10, 11
North Carolina v. Pearce, 395 U.S. 711 (1969)	3
Palko v. Connecticut, 302 U.S. 319 (1937)	8
Stovall v. Denno, 388 U.S. 293 (1967)	10, 11
Tehan v. Shott, 382 U.S. 406 (1966)	7, 8, 9, 11, 12
United States v. Ball, 163 U.S. 662 (1896)	4
United States v. Lanza, 260 U.S. 377 (1922)	7
Other	
61 A.L.R.2d 1141, 1146	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 269

EARL PRICE

Petitioner,

v.

THE STATE OF GEORGIA

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN CERTIORARI

OPINIONS BELOW

The judgment of the Supreme Court of Georgia denying the application for certiorari to review the judgment of the Georgia Court of Appeals is unrecorded, but it is docketed as Case No. 24879, said denial being dated September 24, 1968.

The controlling decision in this matter and the decision from which the application for certiorari was filed

in the Supreme Court of Georgia is reported at 118 Ga. App. 207, 163 S.E.2d 243 (1968).

The opinion of the Court of Appeals of Georgia reversing the Petitioner's first conviction is reported at 108 Ga. App. 581, 133 S.E.2d 916 (1963).

JURISDICTION

The jurisdictional requisites are adequately set forth in Petitioner's brief on the merits.

QUESTIONS PRESENTED

1. Is the double jeopardy clause of the Fifth Amendment applicable to the states through the Fourteenth Amendment? (Petitioner's Questions 2 and 4).

2. Is the holding of this Court in *Benton v. Maryland*, 395 U.S. 784 (1969) applicable to the facts in the instant case? (Petitioner's Questions 1, 3 and 5).

3. Should the holding in the case of *Benton v. Maryland*, 395 U.S. 784 (1969) be made retroactive? (Petitioner's Question 5).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the amendments to the Constitution of the United States are set forth in Petitioner's brief on the merits at pages 2-3.

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT IS APPLICABLE

TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

The merits of Petitioner's Questions 2 and 4 have been resolved by this Court in the case of *Benton v. Maryland,* 395 U.S. 784 (1969), wherein this Court specifically stated "that the Double Jeopardy Clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment." *Id.* at 787.

THE HOLDING IN *BENTON V MARYLAND,* 395 U.S. 784 (1969), APPEARS TO MAKE APPLICABLE TO THE FACTS IN THE INSTANT CASE CERTAIN OTHER UNITED STATES SUPREME COURT CASES DECIDED PRIOR AND SUBSEQUENT TO *BENTON V. MARYLAND, SUPRA.*

The Respondent is, of course, aware of the case of *Green v. United States,* 355 U.S. 184 (1957), which set out the "implicit acquittal" concept. *Cf. North Carolina v. Pearce,* 395 U.S. 711, 746 (1969) (Dissent of Mr. Justice Harlan). The Respondent is also aware that this Court has apparently recognized that an "implicit acquittal" is to be construed in the same manner as an acquittal in fact. *North Carolina v. Pearce, supra,* at 717, fn. 9; Id. at 720, fn. 16.

The Respondent submits however that the instant case is factually distinguishable from other double jeopardy cases decided by this Court with the exception of *Cichos v. Indiana,* 385 U.S. 76 (1966), wherein this Court declined to rule on the merits. Although it would seem that the Petitioner was placed in jeopardy a second time in the same manner that Green was in *Green v. United*

States, 355 U.S. 184 (1957), the Respondent contends that the fact that the Petitioner in the instant case was convicted of the same offense in his second trial as he was at his first trial, should mitigate the effect and applicability of *Green v. United States, supra.* Although the standard for determining jeopardy is not whether one is punished twice, but, rather, it is whether or not he has twice been put in jeopardy, *United States v. Ball*, 163 U.S. 662, 669 (1896), the Respondent submits that it was "harmless error" when the jury returned a verdict of manslaughter after Petitioner's second trial.

The holding in *Hetenyi v. Wilkins*, 348 F.2d 844 (2nd Cir. 1965), that "there was a reasonable possibility that the conduct of the trial and the deliberations of the jury were affected by the fact that [the defendant] was indicted, prosecuted and charged with first-degree murder", *Id.* at 864, has not yet been made the holding of this Court in a case factually similar to the one now before this Court. The holding in the *Hetenyi* case, *supra*, when applied to the facts in the instant case, presumes that the jury did not or would not do its duty in fairly considering the evidence then before it. Certainly it cannot be said that the trial jury did not meet the obligation placed upon it to fairly determine the evidence as it is evident that the trial jury considered the charge of the court on murder (A. 31) not to be applicable inasmuch as it returned a manslaughter conviction. The premise set out in *Hetenyi v. Wilkins, supra*, at 866, is that the jury could not fairly evaluate the evidence then before it for it also had to consider the merits of the charge of murder. The Respondent submits that nothing in the record would support the proposition that the jury did not fairly meet the duty placed upon it.

For the reason that the Petitioner was convicted of the same crime on the second trial as on the first, the Respondent submits that the jeopardy that the Petitioner was placed in on his second trial was "harmless error" in accordance with the criterion set out in *Chapman v. California*, 386 U.S. 18, 21-22 (1967). For this reason the instant case is factually distinguishable from *Green v. United States, supra.*

Considering that the instant case is factually distinguishable from *Green v. United States, supra,* and *Benton v. Maryland,* 395 U.S. 784 (1969), and considering that the effect of Petitioner's second conviction for manslaughter — even though he was tried for murder — was "harmless error", the Respondent submits that the instant case does not present such a controversy of such magnitude that would require the highest court of these United States to sit and determine a factual issue which borders on the abstract. *Cf. Benton v. Maryland,* 395 U.S. 784, 788 (1969). See also *Baldonado v. California,* 366 U.S. 417 (1961), where a writ of certiorari was dismissed after oral argument and examination of the record when it appeared that the totality of circumstances failed to support the substantial due process issues tendered in the petition for certiorari.

CONSIDERING THE PURPOSE TO BE SERVED BY THE NEW STANDARD SET OUT IN *BENTON V. MARYLAND,* 395 U.S. 784 (1969), AND THE EXTENT OF THE RELIANCE BY PROSECUTING AUTHORITIES ON THE OLD STANDARD, AND THE EFFECT ON THE ADMINISTRATION OF JUSTICE OF THE RETROSPECTIVE APPLICA-

TION OF THE NEW STANDARD, *BENTON V. MARYLAND, SUPRA,* SHOULD NOT BE MADE TO APPLY RETROSPECTIVELY TO CASES TRIED BEFORE JUNE 23, 1969.

It is a well-acknowledged proposition that the question of which constitutional principles are to be applied retrospectively and which are not depends upon a consideration of particular relations and conduct, of rights claimed to have become vested, of status, of prior determinations deemed to have finality, and of public policy in the light of the nature of the constitutional principle and its previous application. *Linkletter v. Walker,* 381 U.S. 618, 627, 629 (1965). The *Linkletter* case, *supra,* offered certain standards which should be looked to by this Court when seeking to determine the retrospective application of a principle. This Court said that it would "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker, supra,* at 629. Expressed another way, this Court indicated that it would look to the *purpose* of the rule; the *reliance* placed upon the older doctrine; and the effect on the *administration of justice* of a retrospective application of the newer rule. *Linkletter v. Walker, supra,* at 636. And, perhaps most importantly of all, this Court indicated that it would consider whether or not the new principle went to the *fairness of the trial* — the *very integrity of the fact-finding process. Linkletter v. Walker, supra,* at 639.

In support of the "reliance" theory, the state courts have relied for many years on the proposition that the

double jeopardy provisions of the Fifth Amendment were not applicable to the states, e.g., *Brantley v. State*, 132 Ga. 573, 64 S.E. 676 (1909), *aff'd.*, 217 U.S. 284 (1910); *United States v. Lanza*, 260 U.S. 377, 382 (1922); *Brock v. North Carolina*, 344 U.S. 424, 426 (1953); *Hoag v. New Jersey*, 356 U.S. 464, 466 (1958); *Bartkus v. Illinois*, 359 U.S. 121, 127 (1959). As this Court "again and again . . . refused to reconsider *Wolf* . . ." *Linkletter v. Walker, supra*, at 637, so, too, did this Court again and again refuse to consider cases where the double jeopardy provision of the Fifth Amendment and its applicability to the states were in question. *Cf. Cichos v. Indiana*, 385 U.S. 76 (1966).

For the reasons set out in *Linkletter v. Walker, supra*, at 637, to make the rule of *Benton* retrospective would tax the administration of justice to the utmost. New trials would have to be held. Witnesses available at the time of the original trial might not be available or if located their memory might be dimmed. "To thus legitimate such an extraordinary procedural weapon that has *no bearing on guilt* would seriously disrupt the administration of justice." *Linkletter v. Walker, supra*, at 637-638 (Emphasis added.) See also *Id.* at 639 ("The fairness of the trial is not under attack.")

In *Tehan v. Shott*, 382 U.S. 406 (1966), this Court asked for a review of the identical question posed in the instant case, i.e., brief and argue the question of retroactivity [of the doctrine enunciated in *Griffin v. California*, 380 U.S. 609 (1965)]. In the *Tehan* case, *supra*, this Court adopted the premise set out in *Linkletter v. Walker*, 381 U.S. 618, 628-629 (1965), that resolution of the issue of retrospectivity requires this Court to

" 'weigh the merits and demerits in each case by looking to the prior history of the rule in each question, its purpose and effect, and whether retrospective operation will further or retard its operation.' " Properly applying the *Linkletter* standards, this Court concluded that *Griffin v. California, supra,* would not be applied retrospectively. In arriving at that conclusion this Court considered the reliance by the states to the existing position of this Court — since 1908 — that the federal Constitution did not require the states to accord the Fifth Amendment privilege against self-incrimination. *Tehan v. Shott, supra,* at 412. Such is the situation in the instant case. Since *Palko v. Connecticut,* 302 U.S. 319 (1937), and perhaps even since *Brantley v. Georgia,* 217 U.S. 284 (1910), the states have relied upon the fiat of this Court that the double jeopardy provision of the Fifth Amendment is not applicable to the states. Thirty-two years have elapsed since the *Palko* decision and it was not until *Benton v. Maryland,* 395 U.S. 784 (1969), did this Court declare the *Palko* case to be overruled. Even since *Green v. United States,* 355 U.S. 184 (1957), this Court refused to apply to the states the principle of "implicit acquittal" enunciated in the *Green* case. See *Hoag v. New Jersey,* 356 U.S. 464 (1958). The Respondent submits that as this Court held in *Tehan v. Shott, supra,* at 413, that the misconduct of the police prior to *Mapp* had already occurred and would not be corrected by releasing the prisoners involved, so, too, has the misconduct of the prosecuting authorities already occurred and will not be corrected by releasing prisoners at this late date.

Tehan v. Shott, supra, also emphasized the point that the privilege against self-incrimination "[did] not re-

late to protecting the innocent from conviction, but rather to preserving the integrity of the judicial system. . . ." *Id.* at 415. The principle set out in *Benton v. Maryland, supra,* does not relate to protecting the *innocent* from conviction, for the accused still had all the procedural and substantive benefits then existing and available for his use in trial even though the second trial may have, in fact, placed him in double jeopardy. The factual situation in *Benton* presented what is probably considered the "classic" case of double jeopardy in that Benton was tried on a charge a second time after an *expressed* acquittal the first time. The instant case does not present such a factual situation for although the Petitioner was tried a second time on the same charge as he was tried the first time, he was convicted of the lesser charge on each occasion. The Respondent submits that only the concept of "implicit acquittal" enunciated in *Green v. United States, supra,* would even make the states aware of a federal standard not necessarily consistent with the laws of half of the States. See 61 A.L.R.2d 1141, 1146.

The denial of the basic rights found violated in *Griffin v. Illinois,* 351 U.S. 12 (1956), *Gideon v. Wainwright,* 372 U.S. 335 (1963), and *Jackson v. Denno,* 378 U.S. 368 (1964), would preclude a fair trial. The Fifth Amendment's prohibition against placing an accused in jeopardy more than once "is not an adjunct to the ascertainment of truth". *Tehan v. Shott,* 382 U.S. 406, 416 (1966), and thus, does *not* preclude a fair trial.

This Court carried forward the propositions set forth in *Linkletter v. Walker,* 381 U.S. 618 (1965), and *Tehan v. Shott,* 382 U.S. 406 (1966), and applied them

in *Johnson v. New Jersey*, 384 U.S. 719 (1966). The Court recognized that in *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Jackson v. Denno*, 378 U.S. 368 (1964), "retroactive application was justified because the rule affected 'the very integrity of the fact-finding process' and averted 'the clear danger of convicting the innocent'." *Id.* at 727-728. Additionally, the Court applied the "administration of justice" standard by determining that a retroactive application of *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966), would disrupt the administration of our criminal laws. "It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence and conformity with previously announced constitutional standards." *Johnson v. New Jersey, supra*, at 731. The fact that approximately 18 states allow the retrial of the defendant for the greater offense after his successful appeal makes the above statement from *Johnson v. New Jersey, supra*, even more significant.

Clearly, the mere fact, standing alone, that the defendant was tried for murder a second time after an apparent "implicit acquittal" of murder at his first trial in no way suggests that the second trial was unfair or that the fact-finding process utilized at the second trial was constitutionally substandard. "The extent to which a condemned practice affects the integrity of the truth-determining process at the trial is a 'question of probabilities' . . . such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice." *Stovall v. Denno*, 388 U.S. 293, 298 (1967).

Desist v. United States, 394 U.S. 244 (1969), recognized the burden placed upon the "administration of justice" where there has been "reliance" by the states upon previous United States Supreme Court decisions or declined invitations to abandon old propositions. *Id.* at 248. The *Linkletter v. Walker, supra,* standards as carried forward in *Tehan v. Shott*, 382 U.S. 406 (1966), and *Stovall v. Denno*, 388 U.S. 293, 297 (1967), were relied upon for guidance by this Court in *Desist, supra,* at 249, 250-251, in giving *Katz v. United States*, 389 U.S. 347 (1967), prospective application only.

The Respondent now turns to the question of whether or not the instant case, being on review on the date of decision of *Benton v. Maryland, supra*, should be bound by Benton (and disregarding whether or not the instant case is factually distinguishable from *Benton*).

In *Johnson v. New Jersey*, 384 U.S. 719, at 732-733 (1966), are standards which, when applied to the facts in the instant case, would show that the ruling in *Benton v. Maryland, supra,* should apply only to those questionable trials beginning after June 23, 1969, the date of the *Benton* ruling. This Court clearly considered the impact of a retrospective effect to its earlier *Escobedo* and *Miranda* decisions and concluded that "to upset all of the convictions still pending on direct appeal which were obtained in trials preceding *Escobedo* and *Miranda* would impose an unjustifiable burden on the administration of justice". *Johnson v. New Jersey, Id.* at 733. Respondent urges this Court to find as it did in *Stovall v. Denno*, 388 U.S. 293, 300 (1967), that "the factors of reliance and burden on the administration of justice as entitled to such overriding significance as to make that distinction [between convictions now final and con-

victions at various stages of trial and direct review] unsupportable". *Ibid.* (Emphasis added.)

In *Johnson v. New Jersey,* 384 U.S. 719 (1966), this Court adopted the position taken in *Linkletter* and *Tehan* that the newly formulated principle would not necessarily apply to every case still pending on direct appeal on the date of that decision, and concluded that "there are no jurisprudential or constitutional obstacles" to the adoption of a different cut-off point. *Johnson v. New Jersey, Id.* at 733 (1966). As this Court held in *Desist v. United States,* 394 U.S. 244 (1969), the principle of *Katz v. United States,* 389 U.S. 347 (1967), would apply only to "cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after December 18, 1967". *Desist v. United States, supra,* at 254. Therefore, so should this Court hold that the constitutional principle set out in *Benton v. Maryland, supra,* applies only to those cases in which the questionable trial began after the date of the *Benton* decision, i.e., June 23, 1969.

Respondent submits that even the "compelling circumstances" standard in Mr. Justice Fortas' dissent in the *Desist* case would justify making the *Benton* ruling applicable only to those cases that were tried after the date of *Benton.* See *Desist v. United States,* 394 U.S. 244, 273 (1969).

There is clear judicial authority, as supported by the cases set out above, to support the proposition (a) that *Benton v. Maryland,* 395 U.S. 784 (1969), should not be held to be retrospective, and (b) that the ruling in the *Benton* case should be applicable only to those cases that are tried after the date of the *Benton* case.

CONCLUSION

The Respondent respectfully asks this Court to: (1) find that the instant case is distinguishable on its facts and thus not controlled by *Benton v. Maryland, supra;* (2) find that even if the instant case is controlled by the ruling in *Benton v. Maryland,* that decision should not be retrospective to those cases tried before the date of the *Benton* ruling, and (3) grant such other relief which is incidental to the foregoing.

Respectfully submitted,

/s/ ARTHUR K. BOLTON

ARTHUR K. BOLTON
Attorney General

/s/ HAROLD N. HILL, JR.

HAROLD N. HILL, JR.
Executive Assistant
Attorney General

/s/ MARION O. GORDON

MARION O. GORDON
Assistant Attorney General

/s/ MATHEW ROBINS

MATHEW ROBINS
Assistant Attorney General

Please Serve:
MATHEW ROBINS
P. O. Address:
132 Judicial Bldg.
40 Capitol Square
Atlanta, Ga. 30334

CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the foregoing brief upon Counsel for the Petitioner Mr. Allyn M. Wallace, Attorney at Law, P. O. Box 8102, Savannah, Georgia 31402, his last-known address, by depositing same in the United States mail, properly addressed and postage prepaid.

This is to further certify that all parties required to be served have been served.

This 31st day of October, 1969.

/s/ MATHEW ROBINS

MATHEW ROBINS
Assistant Attorney General